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JUDICIAL PERCEPTIONS OF THE QUALITY OF CRIMINAL ADVOCACY

**Report of research commissioned by the Solicitors
Regulation Authority and the Bar Standards Board**

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June 2018

The Institute for Criminal Policy Research (ICPR) is based in the School of Law of Birkbeck, University of London. ICPR conducts policy-oriented, academically-grounded research on all aspects of the criminal justice system. More details on ICPR at its research can be found at www.icpr.org.

Summary

This report presents the findings of a qualitative investigation of judicial perceptions of the quality of criminal advocacy in the Crown Court. The study was commissioned by the Solicitors Regulation Authority and Bar Standards Board, and undertaken by the Institute for Criminal Policy Research of Birkbeck, University of London.

The study

The aims of the research were:

- to understand the views of the judiciary on the quality of criminal advocacy;
- to establish a baseline to assess and evaluate the quality of criminal advocacy; and
- to address perceptions and any issues of regulatory concern that may require further investigation.

Forty-six circuit judges and four High Court judges - broadly reflecting the demographic and professional profile of circuit judges in England and Wales - were recruited to take part in qualitative interviews. These sought to draw out how judges define good criminal advocacy and how often they think they see good practice in their courts. The interviews also focused on judges' assessment of the key factors affecting the quality of advocacy and how advocacy could be improved, including through input by the judiciary and the regulators.

This was a small qualitative study and as such the perceptions of the quality of criminal advocacy discussed here are illustrative and do not represent the views of all circuit or High Court judges.

Key findings

Defining 'good' advocacy

- Three main themes emerged in the judges' comments about what it means to be a 'good' advocate. They emphasised that advocates should be good **communicators** – referring, as specific aspects of this, to persuasiveness, tailoring the style of address to the audience, and adaptability. They noted **focus**, encompassing the ability to take a strategic and structured approach and to be succinct in addressing the court, as a feature of effective advocacy. They also said that thorough **preparation** is a necessary precondition for 'good' advocacy.
- Judges additionally highlighted the importance of legal knowledge, showing respect towards court users and the court, and assisting the judge. Some judges commented that 'good' advocacy cannot be easily defined.

- A majority of the judges were of the view that being a 'good' prosecution advocate demands a different skill-set or style from what is required to be a 'good' defence advocate. Many said that the best advocates are those who have experience of both roles.

Perceptions of the quality of advocacy

- Most of the judges deemed advocacy to be generally competent.
- Some noted that quality of advocacy differs depending on the seriousness of the case and the professional background of the advocate; solicitor-advocates and in-house barristers were less well reviewed than members of the independent Bar. Judges explained this disparity with reference to differences in the training received by barristers and solicitor-advocates and the narrower professional experience of in-house advocates.
- Distinctions were also made between the quality of advocacy practised in large, urban versus smaller crown court centres, although there were recognised challenges for the quality of advocacy in both types of court setting.
- The judges tended to think that the quality of advocacy had declined over time, with a large proportion of interviewees perceiving standards to be poorer than when they had practised as advocates themselves.
- There was some consensus amongst the judges about their expectations of advocates in meeting core professional standards set by their regulators, with most concern expressed about standards of case preparation and advocates' ability to ask focussed questions of witnesses and defendants.
- One area of practice that is recognised to be largely improving is advocates' skills in dealing with young and vulnerable witnesses. The training provided to advocates on vulnerable court users, and the available court adaptations for vulnerability which are now embedded in routine practice, were said to have brought significant benefits.

Barriers to good advocacy

- More than half of the judges interviewed expressed concerns that declining levels of remuneration in criminal advocacy, and associated low levels of morale within the profession, have a negative impact on the quality of advocacy. A specific concern is that such issues can mean that the most able advocates leave criminal practice in favour of more lucrative work in the civil arena.
- The most commonly cited barrier to high quality advocacy – referred to by almost two-thirds of judges - is that it is common practice for advocates to take on cases beyond their level of experience. This was said to arise particularly in relation to solicitors' firms which, for financial reasons, opt to keep cases 'in house' rather than to instruct independent counsel with the necessary level of experience.
- The judges said that junior advocates, especially solicitor-advocates, are not afforded sufficient opportunities to learn via shadowing and by being mentored by their more

experienced peers; this also affects barristers since it is now less common to instruct both junior and senior counsel to a single case.

- It was also said in the interviews that broader change in the criminal justice system, such as shifts in the size and make-up of court caseloads, economic and time constraints, and technological reforms, can act as further barriers to good advocacy.

Improving the quality of advocacy

- Almost half of the judges argued for more mandatory continuing professional development (CPD) for advocates, and stressed that this, and advocacy training more generally, should be focused on the practical aspects of advocacy.
- There was some support among the interviewees for judicial involvement in the training of advocates, for example, through contributions to Inns of Court training programmes and seminars, or to local initiatives.
- A sizeable minority of the judges perceived a need for formalised assessment of advocates, to be undertaken by an external body, by peers and senior colleagues, or by the regulators. Some felt that such a system should entail determining advocates' capacity to take on certain levels or types of work. Most of the judges, however, were resistant – and sometimes strongly resistant – to the idea of judicial involvement in formalised assessment of advocates.
- On the other hand, the judges tended to regard the provision of *informal* feedback and advice to advocates as part of their role, and as something that can make a significant difference to individuals' practice.
- The main and most explicit demand that our interviewees made of the regulators was that they should be more robust in responding to poor advocacy when alerted to problems by judges or if a new appraisal system were to be instituted. However, there was also some uncertainty among the interviewees about whether, or how, they should report poor advocacy to the regulators.

1. Introduction

This report presents the findings of a six-month study, commissioned by the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB), of judicial perceptions of the quality of criminal advocacy in the Crown Court.

1.1 Background

There has been very little empirical research on the quality of criminal advocacy. An independent review undertaken by Sir Bill Jeffrey in 2013¹ of how criminal defendants are given legal representation in the courts of England and Wales, noted 'a level of disquiet about current standards among judges which was both remarkable for its consistency and the strength with which it was expressed'. The review focused on the implications for quality and the potential problems caused by a significantly changing landscape for criminal advocacy. It refers to a mix of conflicting factors, including reduced reported and recorded crime, much less work with fewer contested trials, but also an increasing number of practising advocates after the 'liberalisation' of rights of audience. Routine data on court caseloads from the Ministry of Justice² confirm a downward trend in numbers of trials in both the Crown Court and magistrates' courts since 2010. For example, 179,794 trials were listed in magistrates' courts in 2010 compared to 149,423 in 2016; the equivalent numbers for the Crown Court were 43,259 in 2010 and 37,339 in 2016 (albeit the latter figure is close to the figure for trials listed in the Crown Court in 2000).

The Jeffrey Review echoed concerns about declining standards of advocacy highlighted in earlier reports by the BSB³ and the Crown Prosecution Service⁴ (CPS). For example, interviews and a survey of 708 criminal advocates (527 barristers, 102 Queens Counsel, 79 Legal Executives or Associate Prosecutors), commissioned by the BSB found unease about criminal advocates acting beyond their competence and worries that standards of advocacy would continue to decline if the regulators failed to act. Both the BSB and CPS reports identified problems with the quality of case preparation, presentation of cases and cross-examination. Research for the BSB on the quality of advocacy in youth proceedings,⁵ undertaken by two of the authors of this report, also pointed to weaknesses in advocacy,

¹ Jeffrey review on *Independent criminal advocacy in England and Wales* (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310712/jeffrey-review-criminal-advocacy.pdf

² Ministry of Justice *Criminal court statistics bulletin: April to June 2017 (main tables)*, Tables M2 and C2, <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-april-to-june-2017>

³ 'Perceptions of Criminal Advocacy', ORC International, 26th March 2012

⁴ 'Follow-up report of the thematic review of the quality of prosecution advocacy and case presentation', HM Crown Prosecution Service Inspectorate (HMCPSI), March 2012

⁵ Wigzell, A., Kirby, A. and Jacobson, J. *The Youth Proceedings Advocacy Review* (2015), Bar Standards Board.

including in relation to knowledge of youth justice law, procedures and provisions, and communication with young defendants and witnesses.

The various concerns raised by the prior research have led to a recognition on the part of the regulators of the need to identify the continuing barriers to high standards of criminal advocacy and to explore and develop new approaches to assessing, monitoring and improving the quality of advocacy. The research reported upon here was commissioned for the purpose of supporting and informing these developments.

1.2 Aims and methods of the study

The overarching aims of this research were:

- to understand the views of the judiciary on the quality of criminal advocacy;
- to establish a baseline to assess and evaluate the quality of criminal advocacy and the competency of individual advocates;
- to address perceptions and any issues of regulatory concern that may require further investigation.

The methodology of the study, as determined by the SRA and BSB, was qualitative, semi-structured interviews with circuit judges and a small number of High Court judges. The interviews focused on the quality of advocates – both barristers and solicitor-advocates⁶ – practising in the Crown Court.

1.2.1 Sampling and recruitment

There were two considerations when deciding upon the method of sampling for the study: that interviewees should reflect, as much as possible, the gender, ethnic and professional profile of the judiciary (in this case, the profile of circuit judges) and that recruitment should be geographically spread, with interviewees recruited from court centres across England and Wales, including from both large and relatively small centres, and those located in urban conurbations and in smaller towns and cities.

The Judicial Office approved the study and made the initial contact with the presiding judge of each circuit, through whom the research team was provided with names and email addresses of potential interviewees. With permission from the Judicial Office, the research team extended the sample by asking a small number of interviewees to recommend colleagues who might be willing to participate in the study.

A total of fifty judges were interviewed: 46 circuit judges from each of the six circuits of England and Wales and four High Court judges (see Table 1.1).

⁶ Solicitor-advocates are those who have been awarded Higher Rights of Audience (HRA), permitting them to conduct criminal or civil advocacy in the higher courts.

Table 1.1: Number of interviews by circuit

High Court	4
Circuit	46
South Eastern	13
Midlands	11
Western	6
Wales	6
North Eastern	5
Northern	5

1.2.2 Structure and content of interviews

Interviews were conducted either face-to-face (19) or by telephone (31), depending on the interviewee's preference and availability. Interviews were semi-structured and guided by an interview schedule, reproduced in the Appendix, which sought the judges' insights in four main areas:

- definitions of what constitutes 'good' criminal advocacy;
- the extent to which advocates meet the core professional standards expected of them;
- factors affecting the quality of advocacy;
- how criminal advocacy could be improved, and the role of judges and the regulators in improving advocacy.

As is usual practice with semi-structured interviewing, the schedule was used in a flexible manner, meaning that the ordering and precise wording of questions could be adapted where this enabled more free-flowing discussion. To ensure that interviews did not over-run – it was agreed with the SRA, BSB and Judicial Office that they should generally be limited to 45 minutes – a priority list of questions was agreed that should be put to every interviewee. (The priority questions are highlighted in yellow in the Appendix.)

The first ten interviews, all of which were conducted face-to-face, acted as a pilot for testing the schedule. Several changes were made as a result of this process. It was also agreed that the judges should be given advance notice of the kinds of questions they were to be asked in interview, and that they would be invited to provide anonymised examples from

recent cases, to illustrate points made, since some of the early pilot interviewees commented that they found it difficult to give detailed answers and examples 'on the spot'.

1.2.3 Analysis

The interviews were audio-recorded and fully transcribed. The analysis focused on identifying the main themes arising from each of the main topic areas, assessing the consistency of responses across interviews to determine the extent of consensus on key points and examining whether perceptions differed by geographic location or any other factor.

1.2.4 Ethics

The study received approval from the Judicial Office and from the Research Ethics Committee, of the Law School at Birkbeck, University of London. All interviewees were sent a study information sheet in advance of the interview, outlining the aims of the research and the areas to be examined during interview. They were also assured of confidentiality and anonymity in the reporting of study findings. Interviewees provided signed consent to take part in the study and for the interview to be recorded for transcription (two interviewees declined to be recorded and written notes of the interviews were taken instead).

1.3 The interviewees

Of the sample of fifty judges, over a quarter were women (14) and all but three described their ethnicity as white. Ages ranged from 44 to 69, with an average age of 57 years. Almost all the judges (47) had previously practised as barristers, and most had worked predominantly or solely in the criminal courts. Four had been solicitors for at least some of their professional career prior to their appointment to the bench. The average number of years sitting as a full-time judge was six years, with a range from under one to 19 years.

In terms of gender and ethnicity, our sample was broadly reflective of the profile of the full population of circuit judges. As presented in Table 1.2, statistics on judicial diversity for 2017⁷ show that around one-quarter of circuit judges are female and, where ethnicity is reported, 4% are from Black, Asian and minority ethnic (BAME) backgrounds. However, our interviewees were younger than average, with 56% being under the age of 60 compared with 46% of circuit judges overall. Most circuit judges come from a barrister background; our sample had slightly fewer judges who had previously (ever) been solicitors: 8% versus 11% of circuit judges.

⁷ *Judicial Diversity Statistics 2017*, <https://www.judiciary.gov.uk/publications/judicial-statistics-2017/>

Table 1:2: Demographic and professional profile of judges

	Interview sample (N=50)	Circuit judges (N= 635)*
Female	28%	27%
BAME	6%	4%
Background - solicitor	8%	11%
Age 40-49	12%	8%
50-59	44%	38%
60 +	44%	54%

*Based on *Judicial Diversity Statistics 2017*

This was a qualitative study involving interviews with a relatively small sample of judges – comprising less than 10% of all circuit judges and an even smaller proportion of High Court judges of the Queen’s Bench Division. As such, the views about the quality of criminal advocacy that are reported here are illustrative and not necessarily representative of all circuit or High Court judges. Further, it is possible that those judges who have strong views or concerns about the quality of advocacy *may* have been more likely to volunteer to be interviewed for the study.

1.5 Structure of the report

The interview findings are set out in detail over the following four chapters of this report. Chapter 2 presents the interviewees’ definitions of ‘good’ advocacy, including the illustrative examples they provided from recent cases they had heard. Chapter 3 reports on the judges’ perceptions of the quality of current criminal advocacy and how that compares to advocacy in the past. We also detail their impressions of how often advocates meet the core professional standards set out by the regulators. In Chapter 4 we discuss the various factors that, according to the judges, undermine the quality of criminal advocacy. Chapter 5 then sets out the judges’ views on what can be done to improve the quality of advocacy, including their perceptions of the role of the judiciary and of the regulators in this regard.

We have assigned a code to each interviewee to protect anonymity. Additionally, we have changed some of the details of specific cases (for example, relating to the nature of the alleged offence or characteristics of victims) that are referred to for illustrative purposes, to prevent identification of the cases or of the judges involved.

2. Defining ‘good’ advocacy

Defining ‘good’ advocacy: key findings

- Three main themes emerged in the judges’ comments about what it means to be a ‘good’ advocate.
- First, judges emphasised that advocates should be good **communicators** – referring, as specific aspects of this, to persuasiveness, tailoring the style of address to the audience, and adaptability.
- The second theme was **focus**, with judges observing that the ability to take a strategic and structured approach, and to be succinct in addressing the court, are essential features of effective advocacy.
- Thirdly, judges said that thorough **preparation** is a necessary precondition for ‘good’ advocacy in any sense.
- Interviewees also highlighted the importance of legal knowledge, showing respect towards court users and the court, and assisting the judge. Some judges commented that ‘good’ advocacy cannot be easily defined.
- A majority of the judges were of the view that being a ‘good’ prosecution advocate demands a different skill-set or style from what is required to be a ‘good’ defence advocate. Many said that the best advocates are those who have experience of both roles.

This chapter explores the judges’ own definitions of high quality advocacy – reporting on what they think it means to be a ‘good’ advocate.⁸ Three main themes emerged in comments made by a large majority of the judges, and in the illustrative examples that they offered of both ‘good’ and ‘poor’ advocacy: **communication**, **focus**, and **preparation**. These themes are discussed, below. We follow this by looking at other key features of advocacy that were frequently mentioned by the judges, and at their comments about the contrasting demands of prosecution and defence advocacy.

2.1 Communication

The judges repeatedly emphasised that good communication is an essential ingredient of advocacy. They spoke about persuasiveness, tailoring the style of address to the specific audience (usually, the jury or judge), and adaptability, as specific aspects of good communication.

⁸ While we are therefore setting out here the judges’ largely unprompted accounts of what it means to be a good advocate, it is possible that some of these accounts were influenced by the brief outline of the interview questions and core professional standards that – as noted in the Introduction – was sent to many of the judges in advance. However, any such influence appeared to us to be minimal.

2.1.1 'An art of persuasion'

Some judges stressed that advocacy is all about persuasion. One commented that it is, by definition, 'an art of persuasion' [CC8];⁹ another said: 'That's actually what you're doing; seeking to persuade someone to your point of view,' [CC28]; while a third described advocates as 'salesmen, and they're selling an idea, in the same way as somebody is selling a product' [CC33].

It was widely recognised that advocates should have an engaging style of communication if they are to be persuasive and to ensure that the audience is listening: several judges said, for example, that it is about effective 'story-telling'. One judge contrasted the kind of prosecutor who opens the case to the jury by talking about legal definitions with the prosecutor who, in a case of assault, tells the jury about the victim's night out in the pub and then:

'picks up [the] photograph of [the victim's] bloodied face and ... pointing at the defendant, goes: "This is what he did." The reason for that is the jury then look appalled, they look horrified at the defendant and we're on the home straight. It's all about understanding basic storytelling, and it goes right back to Jackanory.' [CC29]

The judges also made it clear that the advocate is not simply required to tell a story him or herself, but must have the skills to elicit a story from the witness, particularly when carrying out examination-in-chief.¹⁰ This was described as the most difficult aspect of advocacy by one of the High Court judges, who talked of the need 'to tease out of a witness, in a non-leading fashion, the story the witness has to tell' [HCJ01]. Another judge, as set out in Box 2.1, made it clear that there is also considerable skill to cross-examining in such a way that the jury and the judge are fully absorbed by what is being said.

Box 2.1: Cross-examination which absorbs judge and jury

'The context of the rape was a breakdown in the relationship. ... [Prosecuting counsel] picked probably four good topics and then asked questions that exposed the very thin account that the defendant has given, his very prettified version of their relationship. ... What it did was, in effect, ask questions that were the ones that, if you and I were sitting in front of the telly, watching a crime drama, ... we'd ask: "Well, then, why did he do this? Why did she do that?" He asked it in plain language, there were no fancy tricks, and he didn't try to make points. ... I could see the jury ... [in] my peripheral vision – were absolutely gripped from start to finish. It took an hour and a half, but it was one of those cross-examinations where, if you'd asked me how long it had taken, I'd have said, about 35 minutes. I was gripped.' [CC31]

⁹ The Circuit Judge interviewees have been assigned codes CC1 to CC46, and the High Court judges HC1 to HC4.

¹⁰ Examination-in-chief is when the witness is asked questions by the party which has called that witness.

The following quotation emphasises that the converse of the advocate who genuinely engages his or her audience (there is a reference to ‘entertaining’ the jury, albeit the subject matter that an advocate is dealing with may be distressing and even tragic) is the advocate who is boring and easy to ignore:

‘Once the jury starts emptying their handbag of old receipts when you’re addressing them, you ought to get the idea that you’re not actually entertaining them anymore. I’ve seen that happen too, trust me. ... “What is she doing? Is she looking for a piece of paper and a pen? No: oh my good Lord, she’s clearing her handbag out!” - and she’s spent ... half an hour going through old receipts, which we all do from time to time, but not usually when you’re in a Crown Court listening to counsel’s speech.’
[CC40]

2.1.2 Tailoring communication to the audience

While in the example set out in Box 2.1, the interviewee spoke of both himself, as judge, and the jury as having been absorbed by the cross-examination, many of the interviewees stressed that a different *style* of communication is appropriate for jury and judge. They said that the best advocates are those who can tailor their presentation to the specific audience. While ‘persuasion’ might be key in talking to both audiences, what is needed to be persuasive can be quite different:

‘To be an effective advocate, there are two aspects to it. One is with the judge; one is with the jury. With the jury, a good advocate needs to be simple, clear, audible and persuasive. With the judge, they need to be clear, persuasive, no frills, know the law and put their arguments succinctly and lucidly.... I often have to say to advocates: “Keep in mind I’m not a jury.” They tend to make rhetorical points - so points that have no real merit, which they can get away with, with a jury, where a judge would just sweep them aside.’ [CC03]

Others spoke of the need to have ‘the common touch’ and use ‘language they understand’ when speaking to the jury, while being ‘on top of your material, and properly prepared’ when addressing the judge [CC32]; or compared the ‘more flowery, more colloquial’ communication style that may be suitable for a jury with the ‘hardnosed’ approach that a judge would expect [CC28]. On the other hand, it was also observed that jurors can be sensitive to being patronised or talked down to:

‘Sometimes advocates go too far and try to be too matey with the jury, and tell them a joke or something funny. Or say, “I’m sure you watch such and such on television.” And you can see some of them thinking: “I flipping don’t.” ... And you can see some of them literally quite resent the suggestion that counsel knows what they do.’ [CC21]

2.1.3 Adaptability

Many of the judges stressed the need for advocates to be ‘adaptable’ and ‘flexible’ and to be able to ‘think on their feet’ when they address the court, and particularly when they cross-examine witnesses. This means, for example, that they should be able to ‘abandon a point or pursue a point’ depending on what proves helpful or unhelpful to the case [CC27]; or to respond to unexpected issues that arise while ‘retain[ing] the structure and purpose of cross-examination’ [CC08].

Poor advocacy, in contrast, was said to be displayed by those who insist on ‘reading from a script’ [CC10] or are ‘incapable of coming off their script so that when you do ask them a question it completely throws them’ [CC11]. As another judge commented:

‘There are some advocates who come with a prepared script and, come hell or high water, they intend to deliver the speech they’ve prepared. A judge will very often say something like, “Yes, I have that point”: that’s meant to be a clue that you need not any longer spend any time developing it.’ [CC40]

2.2 Focus

A range of comments about the ingredients of effective advocacy were on the general theme of focus. Within this broad theme, some comments were about **strategy**, with the judges noting that effective advocacy – whether prosecution or defence – depends on the ability to identify, and thereafter to remain focused on, the key points on which the case depends, while leaving to one side weak or irrelevant points. Judges highlighted the importance of a **structured approach** – in putting forward the case as a whole, and also in addressing the court and examining witnesses. And many referred to the need for **succinctness** in the advocate’s communications with the court and witnesses.

The judges generally did not speak about strategy, structure and succinctness as distinct issues: the three were closely interlinked in much of what was said. This is evident, for example, in the following two quotations:

‘A good advocate is concise, ... to the point, relevant and a very keen eye for what is relevant from what is not, is not repetitious or prolix, is focused and there is a plan or strategy, shape or structure about what they are saying.’ [CC29]

‘[The best prosecution advocate is one] who has, from the first moment, understood what the case is about, what evidence is likely to be relevant and which witnesses are going to be relevant. And, putting that in a succinct opening or document for the court, prior to the start of the case. ... To be an effective defence advocate ... you should be bold enough and capable enough to narrow the issues down for each

individual witness and the presentation of your case. You may have 10 points, but only one or two of them will be good points.' [CC06]

One judge described poor advocacy as the opposite of that which is strategic, structured and succinct:

'Questions that are comments, questions that are speeches, mitigation that rambles on about issues that don't concern the length of the sentence, opening addresses that do not assist with where issues in the case lie and speeches that are frankly too long.' [CC14]

Another judge's comparison of clear and focused with unclear and unfocused advocacy is presented in Box 2.2.

Box 2.2: Examples of well and poorly focused advocacy

'I've had a case with a horrifically abused victim who was waiting all day and we had jury problems – discharge and start again. [Defence counsel] managed to cross-examine this fellow over allegations of many years of abuse in 45 minutes. He had two good points and, so he got to those points by taking the witness through the chronology, without going into each and every allegation. ... Those are the two points that he knows are going to be his best points; he makes them and said, "There we are, Your Honour. It's 4:55. I said I'd finish by 5:00. I have done."

Compare and contrast a prosecutor, another member of the Bar ... He was going through everything and hadn't focused on the important points, so I had to. When he'd moved on and he'd forgotten something, I said, "Are you going to ask him about ... how drunk she, the complainant, seems, because we can see it on CCTV. Are you going to ask him about that? Please, ask him ..." Missed the point, the point being later she was so drunk she crashed out and she couldn't have consented. He would have missed it because he was too busy going through absolutely everything, not focused.' [CC18]

While, as discussed in the preceding section of this chapter, judges strongly emphasised the importance of effective and engaging styles of communication, the value given to succinctness makes it clear that, for many judges, *less is more* when it comes to communication. They complained about advocates who talk too much: those who 'waffle on' or are 'rambling'. One judge gave an example of good advocacy from a defence barrister 'in a very, very long and very, very tedious' drugs conspiracy. Throughout the trial, advocates were 'taking every single point, every single argument', but this particular barrister said almost nothing. In his closing speech to the jury:

'he basically said, because they had heard almost nothing about or from his client ... he wouldn't hang a cat based on that evidence – and sat down. [His client] was acquitted ... He let everybody else jump up and down, and his client almost got lost in the mist. It wasn't brilliant advocacy, but very effective.' [CC27]

It is interesting that the judge described this advocacy as ‘not brilliant’, in that it contained no rhetorical flourishes or gripping story-telling of the kind that has been described above, but said it was ‘effective’ in terms of the result achieved for the client.

2.3 Preparation

Many of the judges said that thorough preparation is a necessary precondition for ‘good’ advocacy: it was described, for example, as ‘the basis of all good advocacy’ [CC03] and as ‘the fundamentally important quality for an advocate’ [CC33]. Accordingly, only the well-prepared advocate can communicate effectively and undertake his or her task in a clear and focused way: ‘The first thing is know your brief, whatever the case is about; second, marshal thoughts and the third is presentation,’ as one judge put it [CC22]. Another judge asserted forcefully: ‘Your starting point is not really when people open their mouths in court; it’s what goes on before getting into court’. At a later stage in the interview, this judge reiterated the point, commenting: ‘The battle is won or lost before the court doors are unlocked.’ [CC29]

Some judges described cases in which an advocate’s poor preparation had significant repercussions for proceedings and potentially the outcome. These cases include those outlined in Box 2.3.

2.4 Other features of good advocacy

Other features of good advocacy, as described by the judges, were the possession of legal knowledge; the demonstration of respect towards court users and the court; and the provision of assistance to the judge. Some judges also stressed that high quality advocacy is not something that can be readily defined.

2.4.1 Legal knowledge

Some judges said explicitly that thorough knowledge and understanding of the law, or of the specific legal principles that apply in each case, is a core dimension of good advocacy; this point emerged more implicitly in other comments. The mutual interdependence of knowledge and preparation was stressed in remarks such as the following:

‘The starting point must be a sound understanding of the papers - an advocate who can demonstrate that he or she effectively understands the source materials he or she has to work with. Secondly, an ability to understand the relevant legal principles which arise in the case.’ [CC40]

‘You need a complete understanding of the case, a complete understanding of the relevant law, you need realism about what the case is really about. You need to be able to conduct a proper analysis of the issues in the case and to apply that analysis to your preparation work and your advocacy.’ [CC26]

On the other hand, a practical approach to the law was deemed necessary by another judge who observed that having ‘a solid background on the law’ is more important than being a ‘brilliant academic lawyer’. Indeed, he said that the latter is ‘quite often a hindrance’ – the implication being that too much of a focus on the detail of the law can get in the way of effective engagement with the lay people in court [CC42].

Box 2.3: Examples of poor preparation

- One interviewee [CC01] described a large, multi-defendant trial, during which one of the defence advocates told the jury that his client had served one prison sentence, since which time she had put her offending behind her. On requesting the defendant’s previous convictions, the judge established that her prior offending had been far more serious than suggested by the advocate’s comment.

‘I said to [the advocate], “You have ... painted a picture that is entirely misleading to the jury. The prosecuting counsel is bouncing up and down ready to make an application to introduce the rest of her convictions. What on earth were you doing?” He looked at me, and said, “I haven’t seen her antecedent history.” I said, “You introduced her character. You haven’t seen the rest of her history?” ... That’s quite an incredible omission.’ [CC01]

- At a bail hearing presided over by interviewee CC41, the prosecutor had argued that bail should be denied to a man arrested for assaulting his sister because he posed an ongoing threat. From reading the case papers, the judge discovered that the suspect had said to the police, half an hour after being arrested, that he was going to kill his sister, and ‘If I can’t do it now, I’ll do it when you release me’.

In the judge’s view, the suspect’s threats to kill his sister, made after he had had time to cool down, were the most important factor in the bail decision – but had not been mentioned by the prosecutor, who ‘just hadn’t read [the papers] properly’.

- Interviewee CC33 gave an account of a contested case ‘prosecuted by a CPS lawyer who was perfectly adequate doing knockabout stuff’, but had to deal with a much more serious set of charges on this occasion. The defendant had set alight a family home in the middle of the night, resulting (fortunately) in no more than minor injuries to two inhabitants who had been able to escape. The prosecutor was ‘completely out of her depth’, as clear in part from the fact that she simply relied on the police report when she made her opening address, rather than having prepared her own account:

‘She started the case by opening it from the police report. Now, if ever there was a crime against advocacy, it’s that. The report is obviously prepared by a police officer to explain the facts as they then were to a senior officer to pass on to the CPS. But to use it as an adequate guide to opening the case is just completely hopeless.’

2.4.2 Respect

A good advocate undertakes his or her work ‘with courtesy, and politeness, and calmness’ said one of the judges [CC08]. Several indicated that there is diminishing tolerance, on the part of judges and juries, for ‘aggressive’ treatment of witnesses during cross-examination.

This was also seen as part of a broader trend towards more respectful and considerate treatment of lay people in court – or ‘sensitivity to the humans involved’ [CC45] – and particularly of those who are identified as ‘vulnerable’. (For more on the judges’ perceptions of the improving treatment of vulnerable court users, see Chapter 3). An arguably more traditional conception of ‘respect’ was apparent in references to the importance of advocates ‘being smartly and appropriately dressed’ [CC23]; or displaying the ‘certain decorum that we all know ought to be expected of somebody who’s qualified and appears publicly in court’ [CC02]; or knowing ‘the etiquette of how to behave’ [CC16].

Some judges suggested that treating people well extends to maintaining a clear focus on a client’s needs and expectations:

‘A good or effective advocate is one who advances their client’s case fearlessly and who identifies the issue, crystallises it out and then creates their case around that issue and presents it effectively, either to a judge or to a jury in order to best persuade them to their client’s point of view. It should all be client-focused.’ [CC24]

‘Courage’ is required of an advocate who is prepared to ‘stand up and protect your client’s interests’, said one judge [CC37]. Another judge pointed out that the very word ‘represent’ means to ‘re-present’ the client’s case: ‘You put forward the case on behalf of the client that he or she would put forward if he or she had the skills of an advocate’ [CC42].

It was also observed, however, that serving a client’s best interests has its own inherent tensions: for example, an advocate who takes every point ‘may sound good to the client sitting in the dock’, but may not score so highly with the judge or the jury [HC01]. Another judge commented that he had ‘always been brought up to think there are two types of advocates: ones who *give advice*, which tend to be the good advocates, and ones who *take instructions*, who tend to be the bad advocates and ... unrealistic ones’ [CC37]. And ultimately, another interviewee pointed out, the good advocate should have ‘a strong ethical code where you understand that your primary responsibility is to the court, not to your client.’ [CC44].

2.4.3 Assisting the judge

In a criminal justice system where judges are increasingly required to take responsibility for ‘case management’ and thereby ensure the efficient progression of cases through the judicial process,¹¹ there is an expectation that advocates should be able to assist judges with

¹¹ As set out in Part 3 of the Criminal Procedure Rules (<https://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015>), and outlined in Sir Brian Leveson’s *Review of Efficiency in Criminal Proceedings* (2015, Judiciary of England and Wales). The first of the Core Duties of barristers, which are contained in part two of the *Bar Standards Board Handbook* (third edition, updated 2018), is: ‘You must observe your duty to the court in the administration of justice’ (https://www.barstandardsboard.org.uk/media/1933294/bsb_handbook_version_3.3.pdf).

this task. This amounts to a significant change in how the role of the advocate is understood, suggested one judge:

'The need to contribute to the effective case management of the proceedings did not feature very large, I think, in most criminal advocates' minds as part of their duties as an advocate. But, particularly since it's become the overriding objective in the Criminal Procedure Rules, it has made it clear, it's the professional duty of all those who come before the Crown Court to assist the judge in case management in ensuring that there is an avoidance of delay, the issues are identified clearly at an early stage and that resources, the time of witnesses and, particularly, vulnerable victims are not wasted. That has become a feature which is, to my mind, certainly almost as important as those skills that they need during the trial itself and ... [at] sentence.' [CC38]

Also emphasising the case management role, another interviewee [CC07] commented that a judge dealing with a list of preliminary hearings depends on practical assistance from both defence and prosecution advocates with case progression. Other judges spoke about their expectation that advocates should provide prompt, accurate assistance with legal matters during any hearing, and about their frustration when this help is not forthcoming. A judge complained, for example, that 'when we are giving written legal directions to a jury, [advocates] do not give you the help to which you are entitled' [CC19].¹² He illustrated this point by describing a case in which the advocates failed to assist with a route to verdict which he had drafted: 'The only feedback they provided was...that it was all very wonderful. If they had applied their minds to it they ought to have picked up there was a question missing.' Another judge described a case in which he personally had had to contact a Youth Offending Team manager for information on sentencing. The advocate in this case was so inexperienced that it was 'almost like having ... an unrepresented defendant' [HC02].

But we were also told about advocates 'who you just know are going to be on the money. They're going to be well prepared; they're going to know the answers to what you want to know' [CC23]. And the best advocates, said another judge, are those who not only have the answers to the judge's questions, but can correct the judge when he or she gets something wrong:

'As a judge, the advocate that makes me feel like I'm being put back in my box is a good one. You get an idea and the advocate forcibly, but fairly calmly, explains why it is you're wrong; and to be told that by a good advocate tells me he's doing his job properly.' [CC42]

¹² This, again, relates to the Core Duty of barristers to 'observe [their] duty to the court in the administration of justice', as noted in the previous footnote.

2.4.4 The 'indefinable' qualities of advocacy

While most of the judges had plenty to say about what makes for 'good' advocacy, and what 'poor' advocacy looks like, some highlighted the difficulty of defining the most important qualities in an advocate. One judge said, 'It's a bit like the elephant: you know it when you see it but, asked to describe it, it's quite difficult,' [CC28]; another commented: 'advocacy is one of those almost indefinable things. You know what it is when you see it and you hear it, and it exudes within a few moments almost' [CC22]. In the words of another, 'good advocacy comprises 'about a hundred different things all coming together' [CC44]. There were occasional references to advocacy skills being a matter of 'natural' ability. One judge gave the example of a silk¹³ who, when he spoke, made 'the jury move forward on their seats and listen'; this was said to reflect 'a very indefinable quality. He actually had an amazing court manner. He had a great court presence. He was a large man and he just had the gentleness of touch' [CC42].

2.5 Contrasting demands of prosecution and defence advocacy

The judges were asked whether to be a 'good' prosecution advocate demands the same skills as being a 'good' defence advocate. The replies to this question were mixed. Around one-third of interviewees said that the skills required for prosecution and defence work are largely the same. Among the firmest comments on this point were the following:

'I think they require exactly the same: knowing less is more, and knowing when to stop, knowing when to put a point home and not elaborate and knowing your tribunal, knowing your judge. It doesn't really change whether you're one side of the bench or the other. It really is a feel for the case, the person, how far you can take a point. It really boils down to being realistic and having good judgement.' [CC37]

'The skills are identical, absolutely identical. Yes, both sides have to prepare in exactly the same way. It makes no difference.' [CC29]

Most of the judges, however, argued that the prosecution and defence role each demands a different set of skills or attributes or, at least, a different approach to or style of advocacy. Many said that the best advocates are those who have experience of both roles, since performing the one provides a better understanding of how to do the other, or the diverse skills thereby acquired contribute to an individual's overall competence as an advocate.

Some of the comments about the distinctions between defence and prosecution advocacy focused on the fact that while the prosecutor must construct an entire case based on the available evidence, the defence must simply raise sufficient doubts about what the prosecution has put forward. The defence task was variously described as the effort to 'pull

¹³ A 'silk' is a Queen's Counsel or QC: that is, a senior lawyer who has had more than ten years' practise and is recognised as an expert following appointment by the Queen's Counsel Selection Panel.

one of the bricks' out of the 'brick wall' built by the prosecution [CC34]; to 'knock down' the prosecution's 'edifice' [CC39]; or to 'find a chink' in the 'armour' of the prosecution case [CC24]. Accordingly, the prosecution job was often conceived as a more difficult one – particularly 'if you are prosecuting a number of individuals. You have to keep a lot of balls up in the air... It's much more involved' [CC10].

Some judges observed that a significant difference between the roles of prosecution and defence is that the prosecutor is generally expected to be a more neutral, less partisan figure in the courtroom than the defence advocate:

'The prosecution advocate has a duty to be more even-handed, to present the evidence in a way which is fair, which is a sort of public responsibility. You shouldn't go all guns blazing to get your conviction – that shouldn't be the motivation. From the defence point of view, the only motivation is to get your client off.' [CC27]

'The best prosecution counsel in ordinary jury cases in the Crown Court are those who are the least flamboyant, the most neutral, detached, objective... Too many counsel prosecuting, make the mistake of trying to be something that they think will be more demonstrative and sexy and off the television, and they overstate the case. Defence counsel, on the other hand, can afford to be more flamboyant and add a bit of flourish.' [CC35]

Interestingly, two judges argued that there has recently been a convergence in prosecution and defence styles of presentation, but gave opposite accounts of how that convergence has come about. One [CC09] stated that, unlike 20 years ago, prosecutors today are seeking to 'achieve a result for their particular side, and the particular complainant and victim, or whatever you want to call them, is actually quite important.' This contrasts, he said, with an earlier prosecution attitude of, 'Well, I'll just present the evidence and let's see what happens.' The other argued that rather than prosecution advocates having become more partisan, defence advocates have become more measured:

'It used to be that it was felt the prosecution would be calmer, put your case, you're there for the case, not to gain a conviction. Of course, that's all still true, but what's changed is that the advocacy of even ten years ago, certainly if any longer ago, of the histrionics and playing to the jury, just doesn't work anymore. One, a judge won't allow it to happen. Secondly, juries have become much more sophisticated and simply aren't impressed by that sort of emotive advocacy.' [CC44]

3. Quality of advocacy

Quality of advocacy: key findings

- Most of the judges perceive most current advocacy to be of an ‘adequate’ standard, but tend to view good/very good advocacy as rare. Similarly, poor/very poor advocacy was considered to be uncommon.
- Some judges noted that quality of advocacy differs depending on the seriousness of the case and the professional background of the advocate; solicitor-advocates and in-house barristers were less well reviewed than members of the independent Bar. Judges tended to explain this disparity with reference to differences in training received by barristers and solicitor-advocates and the narrower professional experience of in-house advocates.
- Distinctions were also made between the quality of advocacy practised in large, urban versus smaller crown court centres, although there were recognised challenges for the quality of advocacy in both types of court centre.
- The judges tended to think that the quality of advocacy had declined over time, with a large proportion of interviewees perceiving standards to be worse than when they were practising as advocates.
- There was some consensus amongst the judges about their expectations of advocates in meeting core professional standards, with most concern expressed about standards of case preparation and advocates’ ability to ask focussed questions of witnesses and defendants.
- One area of practice that is recognised to be largely improving, is advocates’ ability to deal with young and vulnerable witnesses. The training provided to advocates about vulnerable witnesses and defendants, and the adaptations to court practice for vulnerable court users, now more routinely embedded in court procedures, are thought to have benefitted advocates’ practice.

In this chapter, we report on the judges’ perceptions of the current quality of criminal advocacy in the Crown Court and whether - and in what ways - they think the ‘quality’ has changed over time. We also focus on the four core professional standards – condensed from more detailed statements of standards set for criminal advocacy by the regulators (SRA and the BSB)¹⁴ and elaborate on how the judges define these standards, including their assessment of how often the different standards are being met by the advocates who come before them.

¹⁴ <http://www.sra.org.uk/solicitors/accreditation/higher-rights/competence-standards.page>
<https://www.barstandardsboard.org.uk/regulatory-requirements>

3.1 Perceived quality of advocacy today

We asked the judges to describe *in general terms* the quality of advocacy in the courts where they sit. Overall, 'very good' advocacy was perceived to be a rare or infrequent occurrence, as noted by one judge, 'If you see someone good, then it really stands out to you because you don't see really good advocacy all that frequently, so that when you do it's glaringly obvious.' [CC53].

The judges described most of the advocates that they see as being of an 'adequate' or 'competent' standard with smaller proportions (although across interviews these estimates varied between 10-50%) being described at either side of that middle range as good/very good or poor/very poor:

Okay, the majority are adequate and quite good. There are some who are really poor and there are some who are really good. I suppose in [my courts] it is maybe 10% are really good, 10% are really poor and everybody else falls somewhere around about the middle.' I would say there are some people who don't impress me much of the time, can actually sometimes really impress me, and everybody has an off day or an off week.' [CC35]

'I think percentages are very hard to say, but I would say that, at a guess, 20% are very, very good. There's a great bunch in the middle. Whether that be 60% or 50%, I don't know. Then, there's a 20% right at the bottom.' [CC66]

'I would say that in about 30% of cases I get advocates who fall into the better category, 30% into the average category and 40% into the lesser category.' [CC19]

Those advocates who were said to be consistently very poor - mentioned as being only one or two advocates in some courts - were well-known to the local circuit judges, who would describe their dismay when such an advocate was instructed to one of their listed cases. One judge's comment, 'the thing about advocacy is that it's not too difficult to do okay, it is very difficult to do well, and alarmingly easy to do badly' [CC26], typified a common view among our interviewees: that advocacy is generally competent with some outstanding highs and lows.

Only a few of the judges assessed that most of what they were seeing on a day to day basis was of a poor standard:

Judge: *'I would say that the competent ones are probably no more than 25% of those that appear before the court.'*

Interviewer: *Right, so 75% you would see are incompetent?*

Judge: *Incompetent, or at least it's my definition of incompetent, the kind of advocate that falls below the standard that the Crown Court ought to expect.'* [CC40]

However, judges' perceptions were nuanced, and they often qualified what they said or made certain caveats when giving their general impressions about quality. For example, several judges noted that the quality of advocacy tended to be better in more serious cases as these tended to be conducted by more senior advocates, and more likely by Queen's Counsel who were thought to be routinely very good:

'...by and large, still, the advocacy, at a serious level, is pretty well done. I mean, it's within my lifetime that a rape would be dealt with by a High Court judge always, and a QC always on both sides. Now, that's how far we've come. At the lower level, it's terribly variable.' [CC08]

'I think the fact that... If you're doing a murder, I think you're going to get higher quality because you're almost certainly going to have a silk. There are not many clowns in silk, there just aren't.' [CC41]

A few judges suggested differences in the quality of advocacy practised in large urban areas compared to smaller Crown Court centres. One judge, for example, felt there is more oversight of who gets instructed on cases in smaller court centres, resulting in 'greater quality control' comparing this favourably to her perception of the situation in London crown courts, of which she has experience, 'where you get the impression that any Tom, Dick and Harry can come along and be instructed' [CC13]. Another judge describes what he sees as the extremes of advocacy in London:

'You get utterly brilliant advocates in London so you get the very best. But if ever there was an area that needs addressing on quality, it is in London courts because people turn up with simply no knowledge of the law which they are purporting to advance and no skill in marshalling their arguments, whereas down here I think it's really quite a high level.' [CC44]

Geographical comparisons were also used to highlight potential impediments to improving the quality in smaller centres. For example, in the first interview extract below, the judge, who has experience of sitting in both types of court location, thought that the smaller criminal bar in less urban locations meant that an advocate whose reputation is poor, would be much less likely to continue to be instructed as everyone would become aware of that reputation - thus helping to create better standards of advocacy overall:

'The quality of the advocacy in London, a lot of it is very, very poor. It's been quite an eye opener to move out on to circuit where of course there's a much, much smaller bar. As a result of which, you don't get bad advocates, you get some who are better

than others obviously, but you do not get bad advocacy because it simply wouldn't survive in much smaller chains, in a much smaller circuit.' [CC44]

In contrast, in the following extract, another judge notes the potential problems of improving advocacy in smaller courts. In this context advocates may work on a smaller number of high profile cases and have limited opportunities to work alongside more experienced advocates:

'They are in the same court every day of their lives, essentially, they are against each other, every day of their life, so they don't see a bigger world for how it might be done or a different style it might be done. Possibilities of how things might be improved.' [CC45]

Another distinction commonly made when discussing the quality of advocacy is related to an advocate's professional background. Most of the judges we interviewed think standards of advocacy *tend* to be higher amongst members of the independent Bar compared to solicitor or in-house advocates. Again, these views were often accompanied by caveats, including for example, acknowledging locally that there are some very good solicitor or in-house advocates - and as noted in Chapter 1, all but two of our sample of judges had previously practised at the Bar thus there may a degree of bias in their opinion. Judges' reasoning for this view tended to be related to differences in the training received by barristers and solicitor-advocates and the breadth of their professional experiences and this is discussed more fully in Chapter 4.

One final point to raise is the concern expressed by some of the judges when discussing the quality of criminal advocacy, about the impact of poor standards on the right of defendants to receive a fair trial:

'...the defendants are getting a very poor deal because they're often very badly represented, and the complainants are getting a poor deal because their cases are very poorly prepared. It's a pretty worrying picture actually, I'm afraid.' [CC13]

But also on how poor advocacy can affect a jury's decision-making and in turn the delivery of justice and the public's protection from harm.

'A jury can sniff out a good and bad advocate without even trying, and if a jury sees somebody being defended by somebody they think is a bad advocate I think they worry about that, and they actually give the defendant some more latitude as a result of not being very well represented.' [CC46]

'There is a major crisis brewing in the courts because of the decline of the standards of advocacy, and an awful lot of people have a strong vested interest in pretending that there isn't a problem, but there is, and it's getting worse. It is very important in the public interest that people are competently defended and of course, it's also highly important

that people are competently prosecuted because otherwise, dangerous people are going to go free.’ [HC03]

3.2 Meeting the regulators’ standards

Chapter 2 has outlined the views of judges on what constitutes ‘good’ or ‘effective’ advocacy. We also sought their feedback on the four core professional standards¹⁵ that the regulators have set as a minimum to be met by all advocates:

- Demonstrating an appropriate level of knowledge experience and skill
- Proper preparation
- Succinct written and oral submissions
- Focussed questioning

These are detailed in Box 3.1 below, alongside examples of how the judges commonly define their expectations in relation to each of the standards. There is some obvious cross-over between the standards and the judges’ characterisations of good advocacy discussed in the previous chapter.

The judges made some general observations about how the four standards are linked and interdependent, meaning that expectations often overlap. And several noted that it was unhelpful to conflate *knowledge*, *experience* and *skill* within a single standard:

‘[It is] the skill issue that troubles me because many people have a lot of experience but really haven’t got much skill and many people with not very much experience at all have clearly got a lot of skill and have acquired knowledge by virtue of work. So knowledge, experience and skill don’t all go together, necessarily.’ [CC05]

There are some clear commonalities in what judges expect from advocates regarding the core standards but less obvious consensus in how often they think advocates achieve these standards, even from judges sitting in the same court centre. Various caveats and qualifiers were often given alongside judges’ efforts to provide ratings. The High Court Judges (N=4) dealt with more serious cases and thus had most regular contact with senior and experienced advocates, who they felt largely met all standards.

Demonstrating an appropriate level of knowledge, experience and skill was thought by most judges to be met by most advocates, although there were some observed differences by professional background, with solicitor-advocates considered to be lacking in experience to conduct some trials (also covered in more detail in Chapter 4):

¹⁵ These core standards are drawn from the Criminal Advocacy Excellence Framework (CAEF), developed and agreed through a programme of workshops involving a range of stakeholders including the three main regulators, the MoJ, the Bar Council, the Criminal Bar Association, and the Legal Services Commission.

'In terms of solicitor-advocates, they can be very good at certain types of cases. Sometimes, they can be better than barristers, but they are, generally, not sufficiently experienced in the conduct of trials. They really need more experience of trials before taking on some quite serious offences - for example, robberies, serious drug offences or firearms cases.' [CC07]

Box 3.1:

How the judges define meeting the core professional standards

1. *Demonstrate appropriate level of knowledge, experience and skill*

- Up to date with the criminal procedure rules
- Familiar with the relevant law (Incl. rules of evidence)
- Familiar with the relevant sentencing guidelines
- Appropriate level of experience for case
- Recognise extent of competence and where further support is required
- Ability to 'think on your feet'

2. *Proper preparation*

- Read the brief and anticipate issues that may come up
- Know all the case documents
- Ability to assist the judge when required
- Have copies of all relevant case documents
- Have thorough chronology of the case
- Know rules about disclosure and comply with these
- Have a plan as to where the case is going
- Identify the witnesses to be fully bound
- Be ready for trial but also for every stage of the case

3. *Succinct written and oral submissions*

- Get to the heart of the submission,
- Clarity
- Avoid 'lots of unnecessary cut and paste'
- Avoid repetition or prolixity
- Don't use 100 words when 10 will do

4. *Focussed questioning*

- Cognisant of the training on questioning of children and vulnerable witnesses
- Know where questioning is leading
- Prepare questions in advance and do not repeat those already asked in evidence-in-chief
- Focus on the most relevant points
- Ask simple, short questions (avoid sub-clauses and double-negatives)

Proper preparation was commonly noted as the basis of good advocacy and foundational to meeting the other standards. It was also more of a concern for judges with some in each of the circuits feeling this was not as good as it should be. However, many also recognised that

there were structural or systemic issues that were affecting how much preparation was being done by advocates (discussed in Chapter 4):

'I think the standards of preparation have slipped. As I said to you earlier, it's something that happens quite a lot where I've prepared a list of, say, 10 cases on the digital case system, and I've spent perhaps an hour in the evening and then a couple of hours in the morning. So, I've spent three hours on my list, but that's all the cases in the list. When I know more about the case than the advocates do, then I get irritated, I'm afraid, because there's no excuse for poor preparation.' [CC23]

Succinct written submissions were generally thought more usual than succinct oral submissions – judges also noted that written submissions are more common now than previously, but overall, this standard received more positive feedback from judges than was given for *Demonstrating appropriate level of knowledge, experience and skill* or *Proper preparation* and was thought to be largely being met by most advocates.

Judges' views on how many advocates meet the standard on *focussed questioning* were much more variable. Some (including in larger circuits) thought that this had changed for the better, particularly in relation to cases involving vulnerable witnesses (see also below) but others highlighted this as the weakest of the four standards:

'If I had to have any particular criticism, that would be it. Focussed questioning is not always there, and I don't really know why that is. Obviously, there are some people that do it brilliantly, so that is a given. There are some people who do it perfectly competently, and I am disappointed that I see as much unfocussed questioning as I do.' [CC27]

'people ask far too many questions and they are far too long and involved, and people don't understand that you don't have to cross examine about everything. You only have to ask those questions which are actually going to achieve something, and people just go on and on, and there is a terrible tendency to cross examine about what people said in statement rather than what people actually did and what really happened. It's becoming more and more wide spread, even good advocates do it, even good advocates cross examine for far too long.' [CC26]

Several judges noted the additional challenge of questioning witnesses whose first language is not English and/or using an interpreter. But as noted below, this underlines the problem of complicated questions that will likely increase the difficulties of translation:

'I think that is the biggest problem. I think that some barristers can do it properly. Most barristers have got these dreadful habits of asking complicated questions in London to witnesses, many of whom aren't good at English, it's not their first

language. If they go through an interpreter, they don't reformulate how they would answer their questions.' [CC13]

One High Court judge explained what he saw as a tendency for advocates to ask too many irrelevant questions that 'destroy a witness's evidence by just meddling in the evidence' He described this as disrupting the coherence of a witness's 'story':

'Quite a lot of advocates will hear the first line, "I saw Jimmy, who was across the road," and you can see, when you're sitting there as a judge, that what that person wants to say is, "And Johnny came from the right and somebody else came from the left. This one hit that one. That one then did this." That's what you can see they want to talk about, and that's what would be most useful. You can come back and deal with the detail later, but you'll get an advocate saying, "Right, so you saw Johnny? Now, what was Johnny wearing?"' [HC01]

Again, comments were made in relation to professional background with some thinking the standard on focussed questioning was more likely to be met by members of the independent Bar than by solicitor- advocates or in-house advocates.

3.3 Perceived changes in quality over time

As well as gaining judges' perspectives on the current state of criminal advocacy, we also wanted to gauge their views on whether standards had changed over time and, more personally, over the course their careers. Of those who were asked about this¹⁶ (N=31), nearly two-thirds (20) perceived standards of advocacy to have declined, four thought they had largely stayed the same and seven felt that advocacy was better than it had been in the past. Judges' assessments of the factors affecting the quality of advocacy and influencing any change to standards are dealt with more fully in Chapter 4.

Sometimes, the judges mentioned a particular feature of advocacy that they felt was in decline. For example, 'court etiquette' and manners were alluded to by several judges:

'The deterioration isn't so much the advocacy and so forth, it is – but maybe it's something that... Maybe I'm a bit old-fashioned – it's their whole manners. People are quite rude, you know, quite discourteous. They don't know how to behave, put it that way.' [CC02]

'[Advocates are] talking loudly to each other across the court, taking instructions loudly from counsel's row to the bench, to the dock ... to the point we can hear every word. ...Hands in pockets are perfectly normal, moving as you're addressing a court,

¹⁶ Interviews were time-limited and this was not one of the core questions (see Appendix for interview schedule) so was asked when there was sufficient time to do so.

backwards, forwards, sideways. I mean, if I'd done that in front of my former Head of Chambers, I think he'd have tied me down. ... By the time you reach the court door, nearly all the advocates have left, they don't stand there anymore waiting for the judge to disappear before they move.' [CC40]

Likewise, where improvements to advocacy were cited, sometimes these were focused on a specific type of advocate, for example, several judges perceived the standard of advocates employed by the Crown Prosecution Service (CPS) to have improved over recent years. The advent of more training for advocates (discussed below) was also noted as an impetus for improved standards in some areas.

Amidst these discussions about changing standards, there was also some nostalgia for the perceived higher quality of advocacy of the past, for the 'old-school panache' – defined as 'commanding attention even if he was reading a phone directory' [CC17]; although this was sometimes accompanied by an apology for appearing 'misty-eyed' [CC17] or for 'harking back to the good old days' [CC20].

'That very high quality of superb advocacy I think has diminished. There is very good advocacy, of the same standard, and much more of it, but you don't get, I think, as it were, the "great" advocates that you did in the past.' [CC08]

And there was some acknowledgment that this 'old-style' advocacy may not necessarily be better than some of the good contemporary advocacy:

'I was led by some particularly talented QCs, and I don't think I've seen the like of them again. But at that time there was much more of a cult of personality; some advocates today may be better.' [CC30]

3.4 Detecting improvements

Within this general narrative of declining standards, there was one area that was considered by most of the judges to be largely improving and this was how advocates deal with vulnerable witnesses and defendants. Several judges sat in courts that had taken part in the piloting of s28 of the Youth and Criminal Justice Act (1999)¹⁷. This was commonly considered to have changed for the better, advocates' practice regarding the questioning of young and vulnerable witnesses. In particular, judges noted the positive impact of Ground Rules Hearings¹⁸. These hearings *can* require that advocates submit to the judge in advance

¹⁷ S28 is a *Special Measure* that permits pre-recorded cross-examination of child and vulnerable adult witnesses. Piloting of this measure took place in three Crown Courts during 2014.

¹⁸ Ground Rules Hearings are required for any trial where an intermediary is used but recommended as good practice for all who have communication needs. These were initially devised as part of intermediary training in 2003 as a means by which the intermediary (ratified by the Judge) in advance of the trial could help inform the

of trial a list of questions they wish to put to the witness and this necessary pre-trial preparation was seen as fostering more effective and appropriate questioning of vulnerable witnesses.

'I have done lots of cases where there have been Ground Rules Hearings and cross examination of young and vulnerable witness where advocates have to prepare questions in advance and give them to the judge for discussion. The difference it makes is enormous. ...By and large those who conduct those cases are either very good or they have learned to be very good at doing it.' [CC19]

'On the whole, the advocates have got it... They're asking the right questions, keeping it simple depending on the age of the child or what the disabilities of an adult witness might be, or whatever it is.' [CC21]

One High Court judge had made a point of talking to local circuit judges in advance of our interview with him about their views of the criminal advocacy they were seeing. He received positive feedback on how advocates are dealing with vulnerability, although also pointed out that more senior advocates tended to take these types of cases:

'The team generally think it is worth pointing out that on the whole, senior counsel/solicitors have been dealing with the Section 28 cases. So, in other words, properly instructed people have been doing it. They have adapted well to this, they clearly are embracing or trying to embrace this and generally, doing them well. In this regard, we feel this does show that there are many advocates who are capable of and willing to adapt and in doing so, demonstrate significant ability.' [HC02]

However, even among those judges who were not involved in the piloting of s28, there was a common view that practice relating to vulnerable court users has got better – and some lamented the fact that, for example, the more focussed questioning of vulnerable witnesses and defendants was not being applied by advocates when questioning those who were not defined as vulnerable. There was also a view that better understanding of the needs of vulnerable witnesses is changing the tone and manner of questioning in court, making a more 'aggressive' style of questioning' in cross-examination inappropriate:

'[advocates] are now much more focused on the questions that need to be asked, are much better at understanding the vulnerabilities of those that are in front of them and the fact that there is no need to harangue or cajole witnesses in order to achieve quite proper points on behalf of your client. I think the whole temperature in court has come down considerably from where it was and that bringing down of the temperature improves advocacy.' [CC44]

style and format of the advocate's questions for a child or vulnerable witness and/or decide upon type of language to be used and need for breaks during questioning.

However, it was noted by one interviewee that practice regarding vulnerable witnesses is much better developed than that for dealing with vulnerable defendants:

'There is a lot of training for advocates dealing with vulnerable witnesses. They do by and large now know how to deal with them. It has taken a very, very long time, but by and large they are better informed about it and they know how to deal with them. Vulnerable defendants there has been almost no focus on at all. The percentages of defendants with mental disorders or learning disorders of some form or another is extremely high. It's certainly over 50%.' [CC10]

The training on vulnerability provided by the Advocacy Training Council (now the Inns of Court College of Advocacy) and the website and toolkit guides of *The Advocate's Gateway* (www.theadvocatesgateway.org) were acknowledged by judges as helping to raise awareness of witnesses' and defendants' vulnerability and of the courts' and advocates' obligations to ensure that court users can understand and participate in the court process. In particular, training has promoted for specialist skills for effective communication with vulnerable witnesses and defendants and has provided resources and guidance to improve advocates' practice in this regard.

'The [Advocate's Gateway] toolkits, I think have helped an enormous amount. People are now in tune as to how they should be questioning vulnerable witnesses a lot more than they were... Most people are aware of those toolkits, and I think with experience you find that it's actually a generalised approach to most vulnerable witnesses. You don't want to ask them certain types of questions. You want to keep questions in a certain format. I think people are now becoming attuned to that more. So, you do get much better preparation from the advocates when they know they're going to be dealing with a vulnerable witness or a child.' [CC01]

A few of the interviewees also mentioned that judicial training on vulnerability has improved judicial oversight in cases involving vulnerable witnesses, noting that judges are now more interventionist in such cases.

'We have an opportunity to involve ourselves with that now, which helps. I don't let advocates ramble on, I'm afraid, even if I haven't seen the questions in advance. If I don't understand the question or it's been asked once already, I stop them. There is greater judicial intervention on the issue of focused questioning, but it is the most difficult of those standards, I think.' [CC23]

One final point made by several judges about the effects of training on advocacy was that younger advocates may be more well-disposed to training and to learning and applying new skills than many of the older more established advocates tend to be:

'Interestingly I think the younger counsel are the ones who are getting better. The older ones who are stuck in their ways are getting better more slowly.' [CC05]

'The newer advocates tend to accept this regime [re the questioning of vulnerable witnesses] it's the older advocates who find it difficult. The old days when you had free reign on any witness, however vulnerable, has long since gone, thankfully.' [CC42]

4. Barriers to good advocacy

Barriers to good advocacy: key findings

- More than half of the judges interviewed expressed concerns that declining levels of remuneration in criminal advocacy, and associated low levels of morale within the profession, have a negative impact on the quality of advocacy. A specific concern is that such issues can mean that the most able advocates leave criminal practice in favour of more lucrative work in the civil arena.
- The most commonly cited barrier to high quality advocacy, as identified by almost two thirds of interviewees, is that it is becoming common practice for advocates to take on cases beyond their level of experience. This was particularly in relation to solicitors' firms who, for financial reasons, opt to keep cases 'in house' rather than instruct an external advocate with the necessary level of experience.
- The judges said that advocates, particularly solicitor-advocates, are not afforded the opportunities to learn via shadowing and being mentored by more experienced advocates; this also affects barristers because it is now less common to instruct both junior and senior counsel to a single case.
- It was also said in the interviews that wider changes in the criminal justice system, such as, changes in size and make-up of court caseloads, time and economic constraints, and technological reforms, can act as further barriers to good advocacy.

Following on from the discussion in the preceding chapter, which notes many judges' concerns about the overall decline in the quality of advocacy, this chapter examines the factors which were perceived to act as barriers to good advocacy. These are grouped into three interrelated issues: factors relating to money, morale and the professional status of advocates; career development; and the changing nature of the criminal justice system.

4.1 Money, morale and professional status

The impact of what was described as 'poor' [CC13] or 'low' [CC44] levels of remuneration, on the quality of criminal advocacy was referred to by more than half of the judges interviewed for this study.¹⁹ For example, judge CC11 commented:

'You know, it's the whole thing about proper remuneration. The fees that are being paid to junior counsel now are the same fees, and I was called in [approximately 20 years ago] ... How are people supposed to live? They need to pay their bills.'

¹⁹ The Jeffrey review on *Independent criminal advocacy in England and Wales* (2014) notes that, following legal aid reforms, fixed fees are now payable to the solicitor to cover all defence costs – including for advocacy – in most Crown Court cases; and that the level of legal aid fees has been significantly reduced through the actions of successive governments.

Several interviewees used concrete examples to describe levels of remuneration, either by describing the impact of falling rates in remuneration upon their own income during their final years of practising criminal advocacy or by providing examples of the kinds of figures advocates might expect to ‘take home’ for their work on a specific type of hearing:

‘The criminal bar has just been crucified financially. In the last year [of practice], my earnings went down 25%. I think the best chambers who still have very good advocates, they supplement their income by doing private work rather than criminal legal aid, and they’ve essentially left the bog-standard crime in the Crown Court to pretty much second-rate people who are poorly-paid and very poorly-motivated.’
[CC13]

‘If you’re getting paid £50 or £60 an hour to prepare a long trial, you’ll do it. But if you’re possibly going to get paid nothing, and if you’re really lucky, £50 for turning up, then there’s no incentive to say, two weeks before, “I’m really going to get stuck into this case, so I can give the best advice I can.”’ [CC30]

Declining levels of remuneration in criminal advocacy, it was argued, meant that fewer advocates were joining the profession, or remaining in criminal law, and instead were moving to better paid, work in the civil arena:

‘Crime’s the poor relation to civil work, and barristers in crime aren’t as well paid as solicitors, I’m afraid there’s a dying breed of really top quality criminal advocates, because the advocates when they’re young, the top-quality people, go and do the civil work, because crime is just not well enough paid. ... Doing crime is far more stressful, you come in front of judges in cases which have real import[ance], when everybody’s under pressure ... in civil cases there’s not that level of pressure, people don’t go to prison for life if they’re convicted; it’s all about money.’ [CC24]

‘It is down to money. It is, and I know this, because I have spoken to many [advocates]. The very good barristers have gone and done other things. There are a few sets of barristers where they are all superb, but most of the really good barristers don’t do crime. They can’t afford to.’ [CC10]

Others argued that the stronger advocates who remain in criminal practice are able to progress, but appear in only the most serious of cases. This was also reflected in our interviews with high court judges, several of whom noted that they didn’t feel able to provide a view on the quality of advocacy overall because they presided over cases of such a serious nature that, in the words of judge HC01, only ‘the cream’ of advocates appear before them. One of the main implications of the move of the more strongly performing advocates to civil practice, or to practice in only the most serious of cases, is that – as highlighted in the previous Chapter – many interviewees perceived that the overall quality of advocacy in the majority of criminal cases has fallen.

As indicated above, poor levels of remuneration were perceived to have an associated impact upon levels of morale among criminal advocates. The following quotations provide just a few illustrations of the ways in which low morale and disenchantment with the profession could, from the perspective of our interviewees, act as a barrier to good or effective advocacy:

'Make sure advocates are properly paid ... they have got to feel appreciated. I don't mean that in a personal way. But I think what they do is so important, and what they do, if they do it well, everything works so much better. I don't mean more people are convicted or more people are acquitted, but the trial process just is far better.' [CC30]

'Well, if people are demoralised, if people think their profession is going to end tomorrow, then they are going to be concerned, they're going to be worried ... that's why I jumped to the bench when I did ... it [is] bound to affect anybody if they're concerned about their families, or their mortgage, or whatever.' [CC36]

'I think the Bar are still doing cases fairly well, but at the same time, I think there is now a greater proportion of what I would describe as a disillusioned counsel of barristers who look like they're just, you know, going through the motions. ... You've probably heard that the payments to the counsel over the years have been, you know, dwindling on the vine a bit.' [CC09]

One consequence of low levels of remuneration and morale among criminal advocates, as perceived by several judges, is that advocates are not demonstrating a commitment to the profession to the same degree as those before them because there is now less incentive to do so. This is particularly so in relation to levels of preparation (as discussed in Chapter 3), as judge CC44 described:

'I think that two things show a decline in advocacy standards. The first is that the appalling level of remuneration now at the criminal bar which means it's very difficult to expect people to put in the early preparation in cases they may well not in fact do because as you know, not only the way the funding structure is but the fact that it is so low means that the old swings and roundabouts has gone. Nobody can say to people, "Well you should prepare cases even if you don't think you might do them," in circumstances when they're not even paid properly for the ones that they do do'.

Others expressed a more critical stance in relation to this and described a complacency or 'laziness' [CC13] among advocates in relation to putting in the necessary hours required of the role in comparison to previous generations: 'I think there's a real reluctance these days ... to put in the hours at the weekend and in the evenings', said judge CC12.

Level of remuneration, though a significant issue, was not cited as the only reason for the perceived poor levels of morale associated with criminal advocacy. Others, such as those relating to career development and the changing nature of the criminal justice system, are illustrated below.

4.2 Career development

The career development of both barristers and solicitor-advocates emerged as a core factor which could impact upon the quality of advocacy. The most commonly cited barrier to good advocacy, as identified by just under two-thirds of interviewees, is the lack of experience of advocates appearing in the Crown Court. This is particularly in terms of advocates taking on cases of a serious nature before they have the requisite level of experience. This concern arose most frequently in relation to solicitor-advocates; Box 4.1 provides just a few examples of cases in which the advocate was perceived to lack the necessary experience to perform the role. Conversely, several judges noted that the best solicitor-advocates were often the ones who practised most regularly, or 'day-in, day-out' [CC27], and were thus able to build up experience.

Box 4.1: Lack of experience equivalent to the seriousness of the case (solicitor-advocates)

Judge CC20 described a case in which three defendants were charged with violent offences. As trial judge he issued a 'silk only' certificate for each defendant. Two of the three solicitors instructed silks. The solicitor-advocate of the third defendant, who was in the judge's view 'the least involved' of the three, refused to instruct a silk and continued to represent the defendant. At trial the advocate was, in Judge CC20's view: *'completely unable to focus on the issues in the case. He was unable to present any compelling argument and [his defendant] was the one with the highest chance of acquittal. ... The whole thing was lost, I'm afraid, in poor advocacy. I remember the case because they were all convicted'*.

'I can remember going to the [Old] Bailey on one occasion, and meeting [a] solicitor that I knew, and saying to her, "My goodness. What are you doing here in the Bar Mess at the Bailey?" She said, "Oh, it's fantastic. I'm junior-ing on this murder." ... She said, "Oh, I've never done a Crown Court trial, but it's fantastic. I'm watching, and it's great." She's a junior brief, and if something had happened to the leader she's supposed to be able to take over. She had never done a Crown Court trial.' [CC01]

'I recently had a defence advocate who, frankly, should not have been doing the case ... I had his [supervisor] in afterwards and said, "[He] should not have been doing this." It was a single sex offence... He was very junior and she said to me, "No, it was a one-count thing". And I said, "No, I'm sorry. Sex offences are really difficult." And unfortunately, he asked a question of a witness that was totally inappropriate. I got the jury out ... and said, "You can't do that. I'm going to deal with it in closing, when I deal with the jury." He asked the same question of another witness the following day and I saw both him and his [supervisor] separately in chambers afterwards ... [He is an] in-house [solicitor-advocate], and she looked at me and said, "Well, judge if he hadn't done it the brief would have had to go elsewhere." And I looked at her and said, "It should have done." I said, "Finance imperatives of your firm should not inform a decision about an advocate."' [CC21]

A specific worry with regard to solicitor-advocates taking on cases beyond their level of experience was that this practice appeared to be driven by solicitors' firms. It was noted that these firms opt, for financial reasons, to keep cases 'in-house' and instruct a less experienced advocate (who will often be a solicitor-advocate) to take on the case, rather than appointing a sufficiently experienced member of the independent Bar. The appointment of in-house advocates by solicitors' firms also came under scrutiny because it means that such advocates are not subject to the same levels of competition as self-employed barristers. This was termed by judge CC20 as a loss of the 'free market':

'There is no hiding place, for the poor advocate when that advocate is independent. ... It's like the poor plumber. If a plumber comes along and makes a rubbish job of your plumbing, you're not going to employ that plumber again. You'll go to a good plumber ... [It's] the same with the advocate. The free market drives quality and when I started at the Bar, the free market prevailed. ... The solicitor simply would not brief a poorly performing advocate, as you would not go to a poorly performing plumber.'

In relation to barristers, several judges expressed the view that members of the junior bar are taking on cases beyond their experience in order to earn a living in a climate where the level of work is 'falling away':

'I think now the level of work at the bottom end has fallen away, at the Bar in particular. People struggle to survive and have enough cases to earn a proper living, and so they will take anything that's given to them, regardless of whether they're actually competent enough to do it. You see people in front of you on cases, and you shake your heads and think, "Why are you doing this case? You shouldn't be doing this case."' [CC01]

'I think the standards of advocacy have deteriorated over the years. That is partly because the advocates who appear in the Crown Court now haven't had the experience that they would have had if they were in practice, say, 20-odd years ago. There was more work then that they would be instructed to do at a lower level. For example, whether they were solicitors or barristers, there would be lots of cases they could go and do in the magistrates' courts, first of all, and then in the Crown Court. They would gradually hone their skills and they would get better through experience.' [CC07]

Underpinning concerns about levels of experience among advocates is the associated lack of opportunities for junior advocates to shadow or be mentored by their more experienced colleagues – an absence which was cited more frequently by our interviewees than gaps in formal training or continuing professional development (CPD). Judges often contrasted the relative absence of shadowing and mentoring opportunities afforded to advocates in the

present day with the opportunities they themselves had had to gain experience upon qualifying. Pupillage was cited as being particularly beneficial because it provides junior advocates with the opportunity to learn from more experienced advocates. Furthermore, several judges drew attention to the smaller number of cases in which both senior and junior counsel are instructed, which means that junior advocates have fewer chances to learn from their more senior colleagues:

'Your first day of pupillage was your real first day learning how to be a barrister. Oh, you could've read a book beforehand, and read a couple of books, that was your first day. You start growing up properly as an advocate on your first day on your feet ... Each day thereafter, you learn the job, and the best tuition you could ever get was a good chambers, that actually regards teaching their youngsters a number one priority.' [CC40]

'Obviously barristers do a pupillage, so they will watch their pupil supervisors, solicitors don't have that luxury ... They don't have that ability to say, "Why didn't you ask this witness that? Why did you do it like that? Why don't you do it like this?" They don't have that on-the-job training.' [CC11]

'And I'm afraid, I believe, particularly, again, having done both, that the standard of advocacy training for solicitors is woeful compared to that of barristers. And some of that is, and this isn't the fault of solicitors, but as a pupil with a barrister, you are tagging along behind. You're seeing everything. You're in the cells. You see them handling the difficult punter. You're seeing absolutely everything. As a solicitor you get trained in a vacuum and are then expected to just go and put it into place.' [CC21]

As the quotations from judges CC11 and CC21 highlight, concern was expressed that solicitor-advocates in particular – due to the differences in training structure in comparison to that for the Bar – are much less able to take advantage of the opportunities for mentoring and shadowing that judges deem central to learning and development.²⁰ Likewise, a potential drawback of having advocates who only ever defend or, in the case of CPS

²⁰ Barristers must have completed 12 months' pupillage in order to become fully qualified. For the first six months they may not accept instructions, and must 'shadow' their pupil supervisor. Throughout the 12 months, the pupil supervisor must 'take all reasonable steps to provide the pupil with adequate tuition, supervision and experience' ([Bar Standards Board Handbook, third edition, updated 2018](#)). Barristers receive higher rights of audience following the completion of the 'first six', three advocacy modules on the Bar Professional Training Course, and the Pupil's Advocacy Training Course (provided by the Inns of Court and circuits).

An individual is admitted as a solicitor following completion of the Legal Practice Course and Professional Skills Course, and having demonstrated the Practice Skills Standards; advocacy is a core part of all of these. In order to receive higher rights of audience, solicitors are required to pass an additional criminal advocacy assessment – following which there is mandatory continuing professional development over five years. The Jeffrey Review noted widespread concern about the fact that, in practice, barristers receive significantly more hours of specialist, mandatory advocacy training than solicitors (including those who obtain higher court rights).

advocates, who only ever prosecute, is that they are not afforded the chance to gain experience of doing both prosecution and defence advocacy; a perspective that was held in high regard by judge CC33:

‘One of the problems with the present system of advocacy and the way in which the work is distributed – that is [the] Bar, defence solicitors, CPS – is that you now have a two-tier system, where many advocates do not both prosecute and defend. ...The CPS always can’t defend, and most private solicitors’ firms will not prosecute, because they don’t want their client seeing them doing the other thing. That is a tremendous loss to criminal advocacy. It’s one of the real strengths of criminal advocates of the past, is they did both. There’s a real benefit in that: you see how the other side works, and you become much more objective.’

Reduced scope to learn from more experienced advocates, among barristers and solicitor-advocates alike, was highlighted as an issue outside, as well as inside, the courtroom. For example, judge CC10 explained that the potential negative impact of barristers spending less time in chambers is that opportunities for seeking advice or support are scant:

‘One of the issues now, is that with the digitalisation of all case papers, nobody now actually needs to go into a Chambers. Because you can get it all online, you can get it all on the digital case system. When I was at the Bar, you had to go into Chambers, because you had to physically pick up your physical brief, so there was an awful lot of interaction with other people. Chambers who are looking to reduce their costs, are not wanting to have such big buildings ... so they are downsizing. People don’t have their own rooms, they don’t have their own desks, because they don’t need it.’

A final barrier to good advocacy, within the theme of career development, is a perception that there are too many routes to qualification for advocates (not only in criminal but also other areas of practice). This was deemed problematic because it means that there are too many advocates for the amount of a) pupillage places and b) work available. An absence of available work means that advocates are not afforded the chance to build up experience within the profession:

‘There are far too many barristers, far too many, far too many solicitor-advocates, for the amount of work that is available. If your pool of work is reduced, you’ve got fewer cases to work on and practise on. Therefore, you don’t get the experience. ... I think that’s the real downfall, because of the flooding of the market there is less work. Everyone is scrambling around for bits and pieces.’ [CC34]

‘There are too many barristers. They should never have widened the number of institutions doing the Bar finals course, because we didn’t need that many barristers. What they’ve done is they’ve created this huge pool of people, all of whom want to be barristers, and there simply aren’t the places.’ [CC01]

An associated and significant concern among some of the judges was that a great many young people are studying law in the expectation that they will find work in legal practice, but are then finding themselves encumbered with huge debts and few possibilities of work:

'[Some advocates] are deeply committed and have a huge vocation for it. But many of the others, even today to become a barrister is very difficult. They would have had to have gone through their three years of university, their conversion course. They will have had to, these days, probably have done a second degree. They would have incurred enormous debts. ... They are likely to be in debt for years and years and years.' [CC10]

'[Advocates are] finally realising, "Hang on. I go through Bar school, I qualify, I've got £60,000 worth of debt and I haven't got a pupillage. If I don't get one in the next five years, my qualification lapses." What on Earth is the point of that? It's a disgrace, it is actually a disgrace. ... [It's] absolutely awful, awful, I mean it just breaks your heart. I feel for them so much, it's not nice. ... I think they'd solve the problem if they just reduced the numbers. If they just went back to the drawing board and said, "Actually, we're not going to take anybody."' [CC34]

4.3 Changing nature of the criminal justice system

A final set of barriers to good advocacy identified by interviewees are those related to broader changes within the criminal justice system, several of which have been touched upon in the preceding discussion. The first relates to the changing nature of the caseload in the criminal courts. Several judges noted that the falling caseload in the magistrates' courts (which is largely a function of falling crime rates and greater use of out-of-court disposals)²¹ means that advocates who may not have previously practised in the Crown Court – and indeed, who may have not been previously inclined to practise in the Crown Court – are doing so in order to sustain a living:

'I don't know where the work has gone. I don't know why it's dropped off so much. It's gone. Literally I can remember, when I was a pupil, if you got sent down to [the local magistrates' court], every single courtroom had something like 120 cases in their morning list. It used to go on until seven o'clock at night you would still be there. ... Then it suddenly seemed to just evaporate'. [CC01]

²¹ HMCTS's ongoing programme of closure of magistrates' courts reflects the declining caseloads (and expectations of increasing use of videolink and telephone hearings). See, for example, *Response to the proposal on the provision of court and tribunal estate in England and Wales* (Ministry of Justice, 2016).

Some judges commented on the implications of the apparent increasing complexity of cases coming before the criminal courts – even while the overall numbers of cases are falling. Several, for example, referred to the rapidly growing proportion of contested cases involving sexual offences that are being heard in the Crown Court.²² While Chapter 3 noted the widespread perception that advocates are dealing better with vulnerable complainants than they did in the past, some of the interviewees also talked of the particular challenges that the change in caseload poses for advocates, and of how this has an impact on the very nature of advocacy:

'I think advocacy is much harder now, because you've got so many more things to deal with. In what I might call the "old days" ... you didn't have to cross examine a child witness – child witnesses weren't on the scene. You didn't have to cross examine the really fragile, disabled witness because ... there was always a reason why they couldn't be brought to court, and they weren't robust enough to go through the process. So it was a lot more straightforward in the old days ... There were just fewer time pressures, fewer cases, narrower range of work, and all a bit more predictable. ... It was all oral testimony from adult witnesses, [we] didn't have screens, didn't have videos, didn't have anything.' [CC32]

The potential emotional impact that such a shift in caseload could have on individual advocates was further reflected upon by judge HC03:

'Murder cases are stressful because of the impact on so many people. Over 50 per cent of Crown Court cases are now sex cases. This is important work, of course it is because it has a high impact on society, but if you do one case after another, which many judges are doing, many barristers are doing, it's not healthy. I suspect that there are occupational health consequences of this, which I suspect are not properly recognised at the moment. Indeed, I think everyone is extremely keen not to recognise it.'

Some judges referred to the wider context of economic strain within the criminal justice system²³ and a focus on efficiency in order that cases are progressed as quickly as possible.²⁴ The impact of such a landscape was reflected upon by several judges at interview:

²² Recent figures from the CPS show that just under one in five cases prosecuted now involve allegations of sexual or domestic violence against women or girls, and chart a 63 percent increase in convictions for offences of this nature within a 10-year period (*Violence against women and girls report: Tenth edition 2016-17*, CPS, <https://www.cps.gov.uk/publication/cps-violence-against-women-and-girls-crime-report-2016-2017>). It has been reported that 'over one-third of contested cases in the Crown court are in respect of sexual offences' (Peter Rook, 'Sea-change in advocacy', *Counsel Magazine*, February 2015).

²³ Central government spending on the courts has reduced by 26 per cent since 2010/11 (National Audit Office, *Efficiency in the criminal justice system*, 2016).

²⁴ Ministry of Justice (2012) *Swift and sure justice: The government's plans for reform of the criminal justice system*, London: Ministry of Justice.

'The police and the CPS are under-funded and over-stretched. They provide very poor service to the advocates in court. Gone are the days when you routinely had someone sitting behind counsel ... The preparation of cases, because of that lack of resource, means that often an advocate will be in court and the instructions are ... that the case is all on the CCTV. That advocate has not seen the CCTV, the advocate can't find the CCTV. The CCTV, when finally produced by ... it's produced on a day-by-day deadline-driven basis and formatted in a way that won't operate on our rather clunky court system. Well, I don't think anybody can perform well in those circumstances.' (CC27)

Such discussions were often tied to technological reforms underway within the criminal justice system.²⁵ In some instances, judges spoke positively of such advances, particularly in relation to the use of pre-recorded cross-examination in the aforementioned YJCEA 1999 Sn28 pilots²⁶, however others described barriers to the quality of advocacy arising from greater use of technology within the courts. Such discussions were usually framed around two issues i) potential difficulties involved in retrieving and managing information on digital systems and ii) the impact of the widespread use of electronic devices, such as laptop, tablets and mobile phones, upon the ways in which advocates communicate in the courtroom:

'I am actually quite a fan of [the digital case system] because it has lots of flexibility, some aspects of it make my job my easier ... [However] it means that the advocate is now in court with a tablet going, "It is here somewhere." You can't present a case while doing that. I'm on the bench going, "Oh no, I can't find it." It doesn't look good. ... there are lots of hiccups and halts. ... The screen with the prison link video won't work, then they're in there messing with tablets. You don't have that sense of a case being presented, but you couldn't say that's the advocate's fault.' [CC27]

'[Advocates] are hidebound when they're cross-examining or examining in chief by their laptops. Their whole world focuses on that little screen, whether they're holding it in their hand, which is really awkward ... When the question is being answered by the witness, they've got their head in their laptop, looking for the next question. ... They, therefore, don't listen to the answers, they don't then act on the answers, and they move on to the next question. You can see the jury ... almost going, "That was a really interesting answer ... Why didn't you move onto the next obviously sensible question?"' [CC31]

As the above quotation demonstrates some of the issues regarding technology were tied, in part, to perceived broader changes in 'court etiquette' in contemporary advocacy, described in Chapter 3.

²⁵ See Leveson, B. Rt. Hon. Sir (2015) *Review of the Efficiency in Criminal Proceedings*, London: Judiciary of England and Wales.

²⁶ As detailed at page 25.

5. Improving the quality of advocacy

Improving the quality of advocacy: key findings

- Almost half of the judicial interviewees made at least some reference to expansion or improvement of advocacy training and/or continuing professional development (CPD) as an important means by which the quality of advocacy can be improved.
- Most of the judges perceived a need for improved responses by the regulators to poor advocacy, whether they envisaged this as part of a formalised system of assessment, or on the basis of more ad hoc identification (generally by the judiciary) of shortcomings in advocacy.
- Although some of the judges argued for the introduction of a new assessment or appraisal system to bolster standards of advocacy, they tended to be resistant – and sometimes strongly resistant – to the idea of formal judicial input into such a system.
- While resisting the idea of a formal judicial role in assessing or supporting advocates, most of the interviewees felt that judges can play an important part in providing *informal* feedback on advocates' performance.
- There was some support among the interviewees for judicial involvement in the training of advocates, for example, through contributions to Inns of Court training programmes and seminars, or to local initiatives.
- There was uncertainty among some interviewees about whether judges can or should be expected to report poor advocates to the regulators.

This chapter presents the judges' views on what can be done to improve the quality of criminal advocacy. As discussed in the preceding chapter, many of our interviewees argued that various broad systemic problems underlie current shortcomings in advocacy; and some suggested that systemic change is what is first and foremost required if there are to be real improvements to advocacy: 'If the powers that be want to make things better, then they should change the system. I'm not their attack dog or their policeman' [CC41]. Other measures, it was said, can be little more than a 'sticking plaster' [CC34] over the profound difficulties faced by the criminal courts and those who work in them. Nevertheless, most of the judges were of the view that there are various practical steps, short of substantial overhaul, which the regulators and others can take to produce positive change. Many called for improved advocacy training and continuing professional development, and for more rigorous assessment and enforcement of standards; the large majority were also of the view that judges have an important (if informal) part to play in helping to raise the quality of advocacy.

5.1 Training and Continuing Professional Development

Almost half of the judges we interviewed made at least some reference to expansion or improvement of advocacy training and/or continuing professional development (CPD) as an important means of raising standards. Most of these comments were not highly specific, but the point that was most frequently raised in relation to this general theme was that CPD requirements should be extended: involving, for example, mandatory attendance every year or two years at a course specifically focused on advocacy.²⁷ It was argued that better, or more, provision of CPD should help to ensure that advocates maintain and build upon the skills they acquire when they are initially trained:

'They need to be refreshing their skills all the time.' [CC13]

'People need to understand that this is a skill that is not acquired and then put on the mantelpiece. This is something that needs to be honed and honed.' [CC36]

'It seems to be that if somebody is practising criminal law, then there should be a significant amount of annual training. Not just in the black letter stuff, but in advocacy training. ...It may be teaching the same lesson again and again, but you can't say it too often about the critical aspects of criminal advocacy.' [HC04]

A number of the judges stressed that training and CPD should be more focused on the most practical aspects of advocacy. In line with comments, as reported in the previous chapter, about lack of opportunities for shadowing and mentoring as a barrier to good advocacy, some judges argued that training and CPD should be structured in such a way that a substantial amount of time is committed to *observing* experienced advocates in action. One judge commented that trainee and junior lawyers should 'go around – every judge, every magistrates' court is different – to watch different judges, different advocates' [CC08]; another said that they should spend time in the Court of Appeal, to 'see something really substantive ... big, proper, chunky points of law' [CC31]. But it was also said that there should be more 'doing' as well as more 'watching' as part of advocacy training:

'Training, training, training. Not just throw them in, so they "learn" without anyone to show them how to do it – train them. Advocacy training sessions. I've been involved in a number of these, where they have advocacy training weekends, the circuit organises them. And they have to actually perform, and we stop them, and we say, 'Don't do it that way, do it this way, and this is why.' Yes, training, training. Plenty of

²⁷ Solicitor advocates are currently required to undertake five hours of advocacy CPD in each of five years following award of their higher rights of audience qualification. Barristers on the New Practitioners Programme (NPP) must attend 9 hours of advocacy skills training in their first three years of practice. However, the BSB does not specify the number of hours or area of practice which subsequent CPD must cover.

ways of doing it. ... Mock-advocacy, mock-trials. You've got to train them to be able to perform on their feet, under pressure.' [CC32]

Given the concerns voiced in many interviews about standards of advocacy among solicitor-advocates (as reported in chapters 3 and 4), it is unsurprising that, in calling for improved training, some of the judges focused particularly on perceived solicitor-advocate training needs. It was suggested, for example, that a system akin to pupillage could be introduced for solicitors, to ensure that they spend some time shadowing experienced advocates [CC39]. More generally, these comments tended to emphasise that solicitors should have practical experience and direct exposure to advocacy in the Crown Court before they are awarded higher rights of audience (see footnote 18 in the previous chapter for an outline of training requirements for solicitors).

The judges made occasional reference to potential new frameworks for the delivery of training; it was suggested, for example, that a unified 'professional advocacy college' could be established, with the remit to provide training to both barristers and solicitors [CC06]. One judge spoke of the 'wealth of retired judges out there who would be marvellous trainers, mentors and educators' [CC31] (For the interviewees' comments about the involvement of current judges in training, see the section below on 'judicial input'.)

5.2 Assessment and enforcement of standards

Another broad theme which emerged in the judges' comments about methods of improving the quality of advocacy was that there is a need for more robust assessment of standards of advocacy. The judges had varying opinions about what any such system of assessment might entail, and on the whole did not elaborate on this point. However, two concerns which arose with some consistency in the interviews were that, first, that there should be greater scope for the regulatory or other legal professional bodies to act on individual advocates who are performing very poorly and, secondly, that any expectation that judges should contribute to formal assessment of advocates appearing before them would cause significant difficulties.

5.2.1 Assessment

When asked about how the quality of advocacy can be improved, between one-quarter and one-third of the judges said that they would like see the introduction of some kind of formalised assessment or appraisal system for advocates. Some stressed that any such system should be based on direct observation of advocates' practice in court: 'Somebody needs to be in court with the advocate, watching what the advocate is doing,' said one judge [CC03], who pointed out that the CPS 'occasionally' do this with respect to the prosecution advocates that they employ. Another judge also commented approvingly of the CPS role in

this regard, noting that they 'have senior people on board come up and seriously watch what went on in court' [CC38].

One interviewee argued that observation of advocates' performance, and determining on this basis whether they need to undertake further training, is something that, 'at core', the regulators should be doing [CC13]. Contrary to this, one judge argued that it was 'very difficult to see' how the regulators could take responsibility for formal observation and assessment of advocates [CC03]. Another suggested that 'an outside body, ... somebody independent of the court process' should be established to review advocacy standards: 'It could be retired judges, maybe, or it could be solicitors or barristers who have experience and are also trained in assessing the advocates' [CC07].

The introduction of a system of appraisal by peers or senior colleagues was another suggestion, including from one of the High Court judges who commented: 'Really experienced, good advocates could come in and watch them and say: "This is what you did wrong there and that's what you did wrong there"' [HC02].

While some of the judges appeared to favour a loose system of assessment or appraisal, others argued for something more structured and robust. Among the strongest statements of the latter view was the following:

'I firmly believe that the only hope of maintaining criminal advocacy is to be absolutely ruthless about a quality control system. We can no longer, it seems to me, say, "Well these people are self-employed, you can't deny them access to work because how are they going to earn a living?" or to simply say, "The market will regulate because solicitors will only instruct capable advocates and that self-regulates," both of which are simply not true. ... If you're going to raise the standard of advocacy and cope with all the problems of funding and recruitment then you've got to, in both defence and prosecution, have a rigorous qualification whereby people are not allowed to do particular levels of cases or types of cases unless they have an appropriate grading and that that grading is enforced ruthlessly, in other words it isn't simply seen as a tick box where people are allowed to qualify.' [CC44]

Along similar lines to the call (from judge CC07, as quoted above) for an 'outside body' to carry out assessments, this judge went on to argue that there should be 'independent external assessors, preferably retired judges, retired members of the bar, whatever, who go round and watch and grade people', notwithstanding the cost of such a system and likely 'huge kickback from the bar'.

A small number of other judges also argued for some form of structured grading system, according to which 'if you're at level whatever, you could do this kind of case and if you're at a higher level you could do more serious cases' [CC16]; or, in the words of another, there would be different 'levels of advocacy ... to make sure that inexperienced people aren't

doing really serious cases' [CC09]. The latter commented that this would be a similar system to that which is already in place for CPS-employed advocates.

5.2.2 Responding to poor advocacy

Most of the judges perceived a need for improved responses to poor advocacy, whether they envisaged this as part of a formalised assessment system, or on the basis of more ad hoc identification (generally by the judiciary) of shortcomings in advocacy. Responsibility for taking action on poor advocates was largely deemed to rest with the regulators, with some judges stressing that the regulators should be empowered to mandate additional training for any advocates who are identified as performing badly:

'I can't help but think there ought to be some ... easy system whereby you [the judge] email the BSB or SRA, whichever it is, and say, "This was the case. This is what Snooks did. Fell far short." Not expecting anything immediately to happen about that. But if Snooks gets five yellow cards, then somewhere along the way, the regulator ought to be able to say: "Right, Snooks should not be doing that kind of case. Snooks needs some retraining." Or whatever it may be. I would expect most judges would think that some sort of yellow card would not go amiss. They would have to have the written assurance, that the regulators looked at it and dealt with it properly.' [HC04]

That in the most serious cases there might be a need for regulators to be able to remove individuals from practice was suggested by some: there should, said one judge, be 'some system of saying to people: this job just isn't for you' [CC03]. This is the same in any profession, he said, but in the law it has generally been 'easier to survive ... and just sort of stumble from case to case'. Another said that the regulators should be encouraging judges to report problematic practice, and should liaise with them in determining the appropriate response – which is likely to be 'either retraining or to look at whether someone's higher rights of audience might be withdrawn' [CC08]. It was also suggested that judges should have two options if they have concerns about an individual advocate: one being to follow the 'traditional route' of informing the head of chambers or senior partner in the solicitors' firm; the other being, in cases where there is 'some form of misconduct', to report to the relevant 'professional body' [CC07] (what exactly was meant by 'professional body' was not made clear). Several other interviewees indicated that reporting to a head of chambers, or possibly a solicitor-advocate's law firm, is an obvious first step to take – albeit taken rarely – when serious problems with an advocate's performance arise.

Five of the interviewees – two of whom were from the same court – spoke of cases of which they were aware in which judges had complained to the regulator about the performance of certain advocates, but these had not been properly acted upon. One of these interviewees

described his own unsatisfactory experience of contacting the regulator about a solicitor-advocate:

'I didn't even get an acknowledgement. I wrote a very long letter, mainly saying, "I wish I could just raise this with someone in the firm, but I can't." But it was a series of problems that had arisen during a trial, which the advocate simply had not dealt with. The trial was over. I think the person was convicted. ... I thought: well, do I follow it up, or do [they] really not care? In which case, that's their problem, not mine. I'm not going to see this advocate again – and I never have. So, no skin off my nose. I've done my bit. But it's annoying.' [CC30]²⁸

Other accounts of frustration at the apparently lacklustre or uninterested responses from the regulators included the following:

'I think there's also a feeling, in terms of the Bar Standards Board and the Solicitors Regulation Authority, that even when quite glaring cases of misconduct are put before them they don't seem to do an awful lot. So, there's a kind of, "Well, what do we do about it, if we've reported it and they've just let it go?" It's very difficult... It takes a lot of effort [to report poor advocacy], and when you think that that effort is probably going to result in absolutely nothing being done...' [CC01]

'If a complaint is made, I have been informed [the Bar Standards Board] do nothing and are as good as useless. ... Yes, you put a complaint ..., and the comment that's been made is that three years down the line they may look at it, but effectively there isn't sufficient sanction or swift dealing with the complaints.' [CC02]²⁹

One judge described a 'rogue defence advocate' who 'says outrageous things about his clients and he sometimes behaves outrageously', was strongly criticised in a Court of Appeal judgement, has been referred to the Bar Standards Board. The judge added: 'Now, I don't know what you do about that. The complaint has been made... He's been fined I don't know how many times. One would like to think he wouldn't get work after that' [CC38].

A few others among the judges were of the view that the regulators simply do not – or even *should* not – have the powers to take decisive action against advocates who fall far below the desired professional standards. One suggested that the remit of the regulators is, more

²⁸ The SRA have a standard form for use in submitting complaints about solicitors (available at <http://www.sra.org.uk/consumers/problems/report-solicitor.page#how-report-sra>). The form can be submitted by any individual, but the SRA now have a process by which complaints from members of the judiciary (which can also be made by telephone or email, and not just through the form) are escalated to be dealt with more quickly.

²⁹ The Bar Standards Board deal with all reports of misconduct made by judges and will take disciplinary action where there is sufficient evidence to prove misconduct to the criminal standard of proof. Misconduct proceedings can take time, particularly where they are challenged by the respondent, although the BSB endeavours to take action as swiftly as possible. Any sanction imposed is determined by an independent Disciplinary Tribunal.

narrowly, to deal with issues of 'dishonesty and corruption' [CC34]. Another posed the rhetorical question, 'What does a regulator do?' if informed of an advocate who is 'absolutely, totally hopeless'. In such circumstances:

'A regulator can't say, "Because you're hopeless, therefore we're going to stop you from practising." So, the best that could be done is: "You're not meeting the required standard; this is what we expect you to do." Even if it's retraining, I don't think you can impose sanctions for being hopeless.' [CC06]

One interviewee argued that, to date, 'the market' has generally provided an adequate mechanism for ensuring that the weakest advocates 'won't actually get much work, or not much important work'. This judge did not perceive an obvious need for the regulators to exercise an 'ultimate sanction', and was uncertain as to 'how they could achieve any sort of proper process of sanction' [CC33]. Another judge was much blunter in his criticism of the regulators, and quite sure that they do not have a role to play in enforcing standards:

'I don't believe regulators have got anything to do with it. I think that the poor advocate, frankly, will never get anywhere and the good one will. ... I don't like regulators. ... No, I don't. I mean, who regulates the regulator? This is a law of supply and demand here. ... A marketplace is the place for that.' [CC04].

It was also suggested that the regulators' actions may be constrained by the difficulty of identifying or defining what amounts to serious shortcomings in advocacy. 'The regulator's got to find out, hasn't he,' said one interviewee [CC12], pointing out that she, as a judge, might encounter a poorly performing advocate no more than once a year in any given court, on which basis it would be difficult to know if there were any serious underlying problems. Another judge commented:

'It would be lovely to think that the regulator could take them off the road But it's so very difficult to define, unless somebody drops a really dreadful bloomer, and that doesn't happen that often. ... I think that's the really tricky bit about it, to be perfectly honest. It's very rarely some ghastly, glaring error... It's usually just so shoddily done.' [CC22]

5.3 Judicial input

While there was some demand for a new appraisal system for advocates, the judges tended to be resistant to the notion of a judicial role in formal assessment. This isn't to say, however, that there was general resistance to any judicial role in promoting good quality advocacy. On the contrary: most interviewees believed that judges have an important part to play in providing feedback to advocates on an *informal* basis. A sizeable minority also felt that judges should contribute to advocacy training. As has already been alluded to above,

some felt it important for judges to be able to report poor advocates to the regulator; however, others were less sure about whether or how judges could perform this function.

5.3.1 Judicial input into formal assessment

In 24 of our interviews, there was some discussion of the possibility of judicial involvement in the formal assessment of the advocates they see in their courts.³⁰ 18 of these 24 voiced their (sometimes strenuous) opposition to this idea, while two were uncertain and four broadly supportive. There was occasional – both positive and negative – mention of the regulators' proposed (and now discontinued) Quality Assurance Scheme for Advocates (QASA) in what was said about formal assessment.

Among those opposed to involvement in formal assessment, two main concerns arose. First, it was argued that there is an inherent conflict between the judge's role as a neutral arbiter in the adversarial court process, and any kind of 'quasi-regulatory or disciplinary role' [CC27]. To express views on the quality of a particular advocate, said one interviewee, would be 'the start of a slippery slope.... towards the judge getting into the arena' [CC03]. Another commented:

'From my part, I cannot see that the judge, where there is an adversarial system, should be responsible for policing advocacy. That's not the judge's role. The judge's role is to listen to the arguments of the advocates and to ensure that there's a fair trial.' [CC20]

The second major concern relating to formal assessment focused on the potential repercussions of a judge's negative appraisal of an advocate. One interviewee pointed out that these repercussions could include an impact on an individual's livelihood, and stated that could leave judges – as they would not be carrying out the assessment as part of their judicial function – open to judicial review. He added: 'I think this is the biggest problem with asking the judiciary to be involved in regulatory matters, because it exposes us to a potential claim by an individual' [CC21]. 'In this day and age,' said another judge, 'anyone who makes an appraisal is at risk of their appraisal itself being appraised' [CC06]. It was also suggested that judicial appraisals could threaten the 'good will' of advocates, on which judges rely [CC18]. In the view of another, accountability is the key issue:

'Accountability is going to be really difficult. If you're filling in a form, does it become disclosable? Are you able to speak freely if it's actually in a document? Who is going to see it? What are the implications if you give someone not such a good reference or whatever? Ultimately, will they be able to sue you? Will there be a system of

³⁰ The interviewees were not explicitly asked whether the judiciary should undertake formal assessment of advocates, but rather were asked (more generally) about whether the judiciary have a role in ensuring the quality of advocacy. Consequently, not all the interviewees spoke about the same specific issues in discussing the judicial role.

complaint? It's going to bring the whole system of trying to run a Crown Court into the unmanageable.' [CC28]

Other concerns raised about formal assessment were that judges might not have the skills or knowledge required to do this well, or simply that they are already over-burdened: 'I think the ... judiciary have far too much piled upon them at the moment' [CC04]. One judge argued that a system of judicial appraisal might produce more timid, rather than better, advocacy:

'You want your advocate to be independent and fearless. Not rude, but to certainly stand up when they need to and when they've got good reason for doing so and saying, 'Judge, I don't agree with you,' or, 'I respectfully submit that you've got it wrong.' If they were to think that they were being assessed or appraised by the judge and that that somehow may later have an impact on the work they get or their accreditation, I think that would be very unhealthy.' [CC38]

On the other hand, among the interviewees who were supportive of the idea of formal assessment by judges, there was some impatience with the hesitancy of their colleagues:

'I know some judges who are really uncomfortable about it, but I'm not. We're there as judges. We can assess, you know? It's fine.' [CC33]

'This is where I disagree, I suspect fundamentally, with the majority of my colleagues. ...The judiciary were very uncomfortable about classifying and judging advocates who appeared in front of them because they said, "Well it's all very awkward. I judge them as x, they then appear in front of me a month later, it is all very awkward." My view is they just need to get over it because nobody is going to put the funding in place for ... independent assessment... Therefore you're left with the judiciary and the judiciary have just got to front up and, it seems to me, take this on board.' [CC44]

5.3.2 Informal feedback by judiciary

At least two-thirds of the interviewees spoke in positive terms – and some at considerable length, and with particular emphasis – about the role that judges can play in providing informal feedback to advocates.³¹ Among these interviewees, a few felt that any such input from judges should be careful and limited. None of the interviewees stated explicitly that judges should *not* provide any type of informal feedback, although one of the more cautious judges emphasised: 'This is not kindergarten and I'm not a teacher' [CC14].

By its nature, informal feedback can take various forms, as was clear from the judges' accounts of how they seek to influence or guide the advocates they see in court. One of the

³¹ As with the issue of a judicial role in formal assessment of advocacy, the question of informal judicial input did not arise in all the interviews as the judges were not specifically asked for their views on this.

High Court judges was adamant that, in simply 'doing his job' as a judge, he is helping the advocates before him to improve their practice:

'You stop people going on too long. ... You stop the defence engaging in unnecessarily prolix cross-examination. You ask people: "What is the point of this?" "What is the issue?" Just a judge doing his job is going to affect the advocacy. Because my job in a criminal trial is not to train advocates or improve advocacy. My job is that the 12 people on my right or left are getting proper appreciation of the case. By doing that, I shall be interfering with the advocates. To that extent you would hope that... the advocates would think, "Right, I now understand what I have to do in this sort of case. Next time I'll do it better, so I don't get interrupted."' [HC04]

Some other interviewees appeared to view the offering of criticism and praise to advocates as a more explicit or discrete part of their judicial role. This might take the form of no more than 'gentle nudges' in the courtroom: 'Who else is going to do it, if not the judge? They're in front of me every day' [CC34]. Another said that while it's not his job to 'train' advocates, when in court, he does 'tick them off; I tell them if I think they're not doing it well' [CC32]. Critical or complementary remarks are often made 'in code', according to one judge: 'An obvious one is something like, "Very helpful, Miss Bloggs." That can convey an awful lot if you are in the inner circle and know the code' [CC28]. In contrast, some judges were evidently prepared to be more robust in their comments in the courtroom:

'I think those advocates worth their salt will not need to be told the same thing twice ... I'm quite prepared to, as it were, get stuck in, without being unpleasant or nasty about it, in the hope that that does encourage people to better themselves.' [CC23]

Two examples of how criticism is delivered in the courtroom are set out in Box 5.1.

Several judges said that if they have a particular comment to make about an advocate's performance, they will do so in private after the case – 'just gently, for developmental purposes, rather than [as] a formal appraisal' [CC30]. With a highly inexperienced advocate, one judge commented, 'I will sometimes call them in and say, "Look, you're going to really get judges on your back if you keep behaving like that."' [CC12]. Another judge said that not only has she occasionally offered feedback to advocates, but she has herself sought advice from counsel on what she could have done better, at the end of a long case:

'I've only done it three times in my career - but people have been stunned by the idea of being asked by a judge to do that. But so many organisations now do 360 feedback and find it a really helpful thing. Courts and those who work in courts are terrible at this. I'd love to get more feedback.' [CC05]

Despite the broad support for informal judicial feedback, a few interviewees had concerns – particularly about possible repercussions of judicial criticisms or corrections of advocates in open court. These, it was argued, might undermine the judge’s (perceived) impartiality, or be taken by a defendant as suggesting grounds for appeal. It was also suggested that judges were considerably more direct and vocal in rebuking advocates in the past, whereas criticism today ‘causes offence and leads to complaints’ [CC35]. One judge commented:

*“We have a Judicial Conduct Investigations Office, and if somebody feels they’re being bullied, then they will say so. I think judges are not willing in the same way that they might have been years ago to make these points, for fear that somebody will not think, “Well, that was humiliating but I’ve learnt a valuable lesson,” but rather think, “Well, that was humiliating, so I’m going to complain about that old b***er.””* [CC36]

Box 5.1: In-court critiques of advocacy

‘Last year when I was out on circuit I started doing floating trials... I had a [defence] advocate in front of me who had never done a Crown Court trial before. So, as you can imagine, it was a bit daunting for him. He actually had a good case on the evidence and I gave him a sort of mini advocacy training session. Because when he asked rolled up questions, I said: “No, stop, you’ve asked three questions there, let’s take those questions one by one” ... I actually directed the jury to acquit at the end of the prosecution case, because the prosecution accepted their case had fallen apart. I said [to the advocate], I hope you didn’t mind me intervening and he said, “Not at all, I’ve learned more today doing this case than in all my experience before that.”’ [HC02]

‘I had one last week, a sentence where the prosecutor didn’t open with how old the victim was in a robbery. Age, obviously, is a factor ... Instead of saying: “Listen, Mr X, why hasn’t the age of the victim [been stated] ...?” in a slightly testy and irritable get-on-with-it-you-muppet way, I’ll say: “Mr X, how old is the victim?” In the hope that if they don’t know the answer they think, “Oh shit, I should have known the answer to that. Next time I’ll read it.” ... If they say: “Oh, 75,” I’ll say: “Well I think that’s relevant.” I’ll say it like that in the hope that they think, “Yes, the judge has read the papers and I’ll take that as a slight rebuke. Next time I’ll make sure I know that.”’ [CC41]

5.3.3 Input into training

In talking about the potential ways in which the judiciary can help to improve the quality of advocacy, around one-third of the interviewees referred to the contribution that judges can or do make to the training of advocates. A few stated that, on grounds of lack of time, lack of interest, they did not wish to have any involvement in training, or that this was not an appropriate role for the impartial judge. One asserted firmly that ‘we’ve got quite enough to learn ourselves, without having to teach other people how to do their jobs’ [CC23].

Those who spoke in positive terms about a judicial training role generally did not elaborate on this, but tended to refer briefly to their own or colleagues’ contributions to advocacy training programmes and seminars, including through the Inns of Court. Some spoke in

broad terms about the judiciary having a responsibility to contribute to the training of advocates outside the courtroom, or said that judges should be asked to engage more in local training initiatives:

'We owe it to the Bar and to solicitors to assist in any courses that are being run.'
[CC04]

'Judges [can help improve the quality of advocacy by] Judges giving talks and lectures to groups of advocates, and saying: 'Look, this is what we would like. This is what we expect. This is what's not happening. This is what should happen.' [CC01]

'We do have responsibility in the courtroom setting to ensure that advocacy is delivered properly. But I think we have a responsibility outside the courtroom as well. If we are expecting these high standards of advocacy then we have a responsibility to try and develop advocates, and the only way that we can really do that in a less formal setting is by training them.' [CC25]

5.3.4 Judicial reporting of poor advocacy

It is noted in the above discussion of 'responding to poor advocacy' that a number of interviewees perceived a need for more robust action by the regulator in relation to judges' complaints about poorly performing advocates. However, some interviewees were not so sure that the reporting of poor practice to the regulators should fall within the judicial remit, or were uncertain about the process by which judges can or should make such reports.³²

It was pointed out, for example, that it can be difficult to draw a line between 'poor advocacy' and 'professional misconduct'. One judge said that while he 'would have no hesitation in reporting somebody for professional misconduct', it is much more difficult to know how to deal with advocates 'who are doing the job, perhaps to the best of their ability, but not as good as others' [CC23]. Similarly, another commented that he would generally only go to a regulatory body in relation to someone who 'was being dishonest and was breaching his professional code', and did not know at what point he would report an advocate whose practice was persistently very poor [CC21]. A judge described having recently had an advocate in front of him who was 'awful', but not so bad that he felt compelled to put in a report to the regulator. This, he said, would only happen if the individual crossed the border between competence and obvious incompetence, and added:

'I don't know - I mean, it's really difficult. And also, there is an inherent part of our job that we don't want to stop people earning a living, you know – I mean, because I've got a conscience. I'd like to engage, but as to how far I engage, it's difficult, and we

³² Most of the interviewees did not talk explicitly about the issue of judicial reporting of poor advocacy to the regulators.

don't get much training, or much information, as to what we should be doing about it.'
[CC09]

Another judge also stressed that she does not know how best to address such issues. She spoke about a 'diabolical' and very inexperienced solicitor-advocate who had named himself as the junior advocate in a forthcoming highly serious case. The judge said that she had 'refused' this, on the grounds that the advocate is 'not competent', but posed the question: 'Now, should I, in those circumstances, be notifying the regulator that this is what he has done? Or do I just do what I have done, which is to say: "You're not doing it in my court, Sonny-Jim."' This same interviewee went on to talk about the dilemma she faces in relation to an advocate who appears to have mental health problems:

'Should I write to her head of chambers? Should I report her to the Bar Council? Should I call her in and say, "We are all concerned that there is something wrong with you." How do you deal with it? But we didn't have any interaction from the regulators, so we're not told what we're meant to do. ... It is very difficult. ... I certainly wouldn't know what to do as a judge, about how and when I should raise a complaint.' [CC10]

6. Conclusion

This study involved interviews with 50 circuit and High Court judges. The interviewees were drawn from all six circuits of England and Wales, and their lengths of service as full-time members of the judiciary ranged from less than a year to almost 20 years. 14 were women and three were from black and minority ethnic groups.

6.1 Judicial perceptions of the quality of advocacy

In interview, the judges spoke about a number of different skills or attributes that are associated with 'good' advocacy, but some common themes emerged from what was said. Comments about the defining features of a good advocate most frequently highlighted the importance of good communication (particularly, a persuasive style of communication that is tailored to the audience), a focused and strategic approach, and a willingness and capacity to undertake thorough preparation. Good advocates were also described as those who demonstrate their legal knowledge, are respectful to court users and the court, and provide assistance to the judge.

Most of the judges we interviewed spoke of there being wide disparities in the quality of the advocacy that they see in their courtrooms on a day-to-day basis. There was a widespread perception that most advocacy is competent or adequate, with a minority of advocates displaying good or very good practice and, at the other end of a spectrum, a minority whose performance has severe shortcomings – which inevitably impact the capacity of the courts to deliver justice. Some of the judges argued that there is a geographic element to the disparities in quality: reference was made to both facilitators of, and impediments to, good advocacy in large urban areas including London. Many interviewees made the point that the better performing advocates tend (although by no means exclusively) to be members of the independent Bar rather than solicitor-advocates; it was also argued that the best advocacy tends to be seen in the most serious cases that come to court. Most of the judges who spoke about change in the quality of advocacy over time were convinced that standards have been declining in recent years. This pessimism was sometimes coloured by a certain nostalgia for a past in which the renowned, 'great' advocates had made their mark. On the other hand, a minority of interviewees stated that the quality of advocacy has been largely consistent over the years, or has improved.

According to the judges, a range of factors underlie shortcomings in the quality of advocacy. Most of these lie far outside the influence of the regulators. Declining remuneration for criminal legal practice was regarded by many as a significant problem – and was said to be linked to poor morale among criminal practitioners, a lack of professional commitment, and a growing tendency for the most able and ambitious junior advocates to move into other types of practice. Judges also pointed out that increasing time pressures on advocates – within a criminal justice system in which the efficient and swift prosecution of cases is heavily prioritised – are changing the very nature of advocacy; and that advocates face both

challenges and potential benefits arising from the growing use of new technologies in the presentation and management of cases.

Another factor impacting the quality of advocacy was said to be the reduced but proportionately more complex caseload of the criminal courts, which provides less scope for junior advocates to build up skills and experience through working on relatively minor or straightforward cases in both the magistrates' and Crown courts. Indeed, perhaps the greatest concern among the judge interviewees was that – for reasons beyond the changing court caseloads – junior advocates do not have sufficient opportunities to learn on the job and gradually gain experience prior to taking on serious Crown Court cases which demand a high level of skill. This was deemed to be a particular problem in relation to solicitor-advocates. Judges commented on the lack of an equivalent period of practical learning for solicitor-advocates to that provided for barristers through the system of pupillage. They also criticised legal firms' growing use of inexperienced in-house advocates (who are often, although not exclusively, solicitor-advocates) in cases which would be better served by the instruction of an experienced member of the independent Bar.

According to the judges, the problem of advocates taking on cases beyond their experience is not limited to solicitor-advocates. Interviewees noted that some junior barristers are taking on cases that are too difficult for them simply because it is difficult otherwise to make a living at this time of economic constraint. It was also pointed out that there are ever fewer cases in which both senior and junior counsel are instructed, meaning that there are fewer opportunities for individuals to learn from their senior colleagues – while opportunities for informal shadowing and mentoring are also curtailed because barristers are generally spending less time in Chambers.

A clear message conveyed by our interviews with judges was that many of the deficiencies in criminal advocacy today have their roots in criminal justice structures and processes as a whole, or reflect broad systemic change. There is little that the regulators can do to counter these structural forces. Nevertheless, our judicial interviewees spoke about steps that should be taken by the regulators, along with training bodies, to bolster the quality of advocacy, and had much to say about the part judges themselves can play in supporting good advocacy.

6.2 Supporting better advocacy

In light of their concerns about advocates taking on work for which they have not yet acquired the necessary skills and experience, it is unsurprising that a number of the interviewees argued for more mandatory continuing professional development, and stressed that this – and advocacy training more generally – should be focused on the practical aspects of advocacy. Following from the specific concerns about the performance of solicitor-advocates, it was also argued that the award of higher rights of audience to solicitors should be dependent upon practical experience and direct exposure to advocacy in the Crown Court. A number of the judges expressed a willingness to contribute to the

training of advocates, or are already doing so.

A sizeable minority of interviewees perceived a need for formalised assessment or appraisal of advocates, and variously suggested that this could be undertaken by an external body, by peers and senior colleagues, or by the regulators. Some felt that such a system should entail determining advocates' capacity to take on certain levels or types of work. There was a general resistance to the idea of judicial input into formal appraisals of advocacy – as had been intended, for example, as part of the proposed Quality Assurance Scheme for Advocates (QASA). Opposition to judicial involvement in assessment was based on concerns about possible repercussions of negative appraisals of advocates, and about the potential conflict between the judge's role as a neutral arbiter and a regulatory role. On the other hand, a few judges were dismissive of their colleagues' hesitation, arguing that it was reasonable to expect that judges should help to assess advocates. Most of the interviewees felt that the provision of *informal* feedback and advice (whether in an oblique fashion in the courtroom, or more directly but privately in their chambers) to advocates is part of their judicial role, and can make a significant difference to individuals' practice.

The main and most explicit demand that our interviewees made of the regulators was that they should be more robust in responding to poor advocacy when alerted to problems by judges or if a new appraisal system were to be instituted. A few of the judges voiced strong criticism of perceived failings by the regulator to take action against incompetent advocates in the past. It was argued that effective responses to poor advocacy might involve mandating additional training or, in the most serious cases, removing advocates from practice. A small number of the interviewees, however, argued that the regulators do not, or even *should* not, have the requisite powers to act on advocates whose performance is inadequate. There was also uncertainty on the part of some of the judges about whether, or how, they should report poor advocacy to the regulators. Part of the difficulty, it was suggested, lies in determining what level of inadequacy or incompetence would merit a formal complaint to the regulator (with a more informal approach to a head of Chambers of law firm being a preferred first option in many cases).

As a whole, the interviews with the judges painted a picture of mixed standards of advocacy across the Crown Court of England and Wales. While most advocates were deemed competent or adequate, many of the judges voiced profound concerns about the performance of some of the advocates they routinely see in court, and felt that high standards were displayed by no more than a minority. Many also spoke of witnessing a general decline in the quality of advocacy. However, it is striking that many judges talked about one aspect of advocacy having improved in recent years: namely, advocates were said to handle vulnerable court users in a more skilful and appropriate manner than they typically did in the past. This provides a clear demonstration of the fact that focussed efforts to improve legal practice – encompassing policy change, training, the provision of practical guidance and advice, and the raising of awareness – can have a significant and lasting impact.

APPENDIX

Interview schedule:

Judicial perceptions of the quality of criminal advocacy

[Questions highlighted in yellow are the priority questions.]

A. Respondent's background

1. Length and type of experience as a judge:

- For how long have you served as a judge - part-time and full-time?
- For how long have you sat at this court and at any other courts?
- Do you sit in the family and civil courts and, if so, what proportion of your time do you spend in the Crown Court?

2. What was your professional role prior to becoming a judge, and in what area(s) of law did you practise?

B. Defining 'good' criminal advocacy

3. In your view, what does it mean to be a 'good' or 'effective' advocate?

4. With reference to recent cases you have heard (**but without identifying individuals or cases, or providing any detail that could potentially identify an individual or case**), could you provide some illustrations of 'good' or 'ineffective' advocacy?

- What was 'good' or 'effective' about the advocacy in these cases?

5. With reference to recent cases you have heard (**but without identifying individuals or cases, or providing any detail that could potentially identify an individual or case**), could you provide some illustrations of advocacy that could be described as 'poor', 'ineffective' or generally 'unsatisfactory'?

- What was 'poor/ineffective/unsatisfactory' about the advocacy in these cases?
- What were the repercussions of the 'poor/ineffective/unsatisfactory' advocacy?

6. Does being effective as a defence advocate require the same skills and attributes as being effective as a prosecution advocate? If not, how does it differ?

7. In general terms, how would you describe the quality of criminal advocacy in the cases that you hear?

- What proportion of defence advocates would you describe as 'good/effective'?
- What proportion of prosecution advocates would you describe as 'good/effective'?
- How would you classify those defence advocates who are not 'good' (eg proportions 'satisfactory' and 'poor')?
- How would you classify those prosecution advocates who are not 'good' (eg proportions 'satisfactory' and 'poor')?

C. Professional standards

8. The regulators have defined four core professional standards which, in their view, all advocates should meet. These standards are:

- i. Demonstrate the appropriate level of knowledge, experience and skill
- ii. Proper preparation
- iii. Present clear and succinct written and/or oral submissions
- iv. Conduct focused questioning

With regard to each of these standards, please can you tell me your view of:

- What does 'meeting the standard' entail?
- Approximately what proportion of advocates meet the standard?

9. With regard to those standards where advocates' performance is most lacking, what do you think are the main reasons for these shortcomings?

D. Factors influencing the quality of criminal advocacy

10. In your view, how and why – if at all – has the quality of criminal advocacy changed over the course of your career in the criminal law?

11. 'Do certain types of cases pose particular challenges for advocates, eg case involving particular offence types, or vulnerable defendants or witnesses?'

12. To what extent and how does an advocate's professional experience tend to impact the quality of his/her advocacy, eg:

Prompt:

- Length of time in the role?
- Type and range of experience (eg as prosecution or defence, or in different types of court, in different courts/localities)?
- Other aspects of background/experience?

13. To what extent and how do wider factors – eg relating to the courts and the criminal justice system as a whole – impact the quality of advocacy?

E. Improving the quality of advocacy

14. In your view, how could the quality of criminal advocacy be improved?

15. What improvements, if any, do you think should be made to the training of a) barristers and b) solicitor-advocates, in order to improve the quality of criminal advocacy?

16. What improvements, if any, do you think should be made to CPD for advocates?

17. Do you think that the effectiveness of training has changed over time?

18. Do you think that the judiciary have a role in ensuring the quality of advocacy and, if so, what is this role and how does it fit with that of the regulators and others?

- Where there are poor advocates, what action from the regulators would be appropriate?

F. Close

19. Please could you tell me your age/age band and how you would describe your ethnicity?
20. Do you have any further comments or reflections on the quality of criminal advocacy?